**THE TESTAMENTARY EXECUTOR IN
ENGLAND AND ELSEWHERE**

London: C. J. CLAY AND SONS,
CAMBRIDGE UNIVERSITY PRESS WAREHOUSE,
AVE MARIA LANE,
AND
STEVENS AND SONS, LIMITED,
119 AND 120, CHANCERY LANE.

Glasgow: 50, WELLINGTON STREET.
Leipzig: F. A. BROCKHAUS.
New York: THE MACMILLAN COMPANY.
Bombay: E. SEYMOUR HALE.

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THE TESTAMENTARY EXECUTOR

IN

ENGLAND AND ELSEWHERE

BY

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OF LINCOLN'S INN, BARRISTER-AT-LAW.

(BEING THE YORKE PRIZE ESSAY FOR THE YEAR 1899)

London:

C. J. CLAY AND SONS,
CAMBRIDGE UNIVERSITY PRESS WAREHOUSE,
AVE MARIA LANE.

1901

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Cambridge:

PRINTED BY J. AND C. F. CLAY,
AT THE UNIVERSITY PRESS.

PREFACE.

THIS essay, which won the Yorke Prize in 1899, is published in accordance with the regulations governing that prize. The subject set to competitors was "The testamentary executor in England and elsewhere"—a subject so large that I found it necessary to restrict myself to one of the lines of inquiry suggested. I have attempted, after tracing the origin of the executor, to contrast his fortunes in England, France and Germany, and in so doing to illustrate the fundamental divergences in the legal history of those countries. To do even this thoroughly would have required a far deeper and wider knowledge of the history of law in Europe than I could command. The first essay of a novice in legal history may perhaps meet with even should it not deserve the indulgence of learned critics.

R. J. R. GOFFIN.

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CONTENTS.

	PAGE
BIBLIOGRAPHY	ix
CHAPTER I.	
TESTAMENTARY EXECUTION IN ROMAN LAW	1
CHAPTER II.	
THE ORIGIN OF THE TESTAMENTARY EXECUTOR	13
CHAPTER III.	
THE TESTAMENTARY EXECUTOR IN ENGLAND	35
CHAPTER IV.	
THE EXECUTOR IN FRANCE	79
CHAPTER V.	
THE EXECUTOR IN GERMANY	110
CONCLUSION	134

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CHAPTER I.

TESTAMENTARY EXECUTION IN ROMAN LAW.

ALTHOUGH the testamentary executor in the modern sense was unknown to the classical Roman law, and the origin of the institution must be sought, according to the now generally accepted view, in Germanic sources, a sketch of the Roman methods of ensuring the execution of wills will be a useful and almost a necessary preliminary to a historical essay on the testamentary executor, and this for several reasons. The modern law of executors owes much to Roman law, though it has its root elsewhere; Roman law has filtered into it through the practice of those ecclesiastical courts which had formerly, in England an exclusive and elsewhere a concurrent, jurisdiction in testamentary matters; since the reception of Roman law in Germany in the sixteenth century it has influenced the law of executors, as it has influenced many other departments of law, German in their origin, in the way that one system of law is bound to influence another and a less highly developed system which is being administered by its side; while on the law of France and Italy Roman law has always exercised a vast influence. It is impossible to understand how it comes about that the executor nowadays holds such a subordinate place in the legal systems of the Continent as compared with his importance in England without first obtaining a clear notion of the Roman system of testamentary execution.

Every valid Roman will contained an institution of an heir¹, and the execution of the terms of the will was the instituted

¹ Gaius 2. 229.

heir's duty. So we may call the *heres* the executor of a Roman will, just as centuries after Justinian the executor was called *heres*. But the instituted heir was more than a mere executor; he was the universal successor of his testator¹, and as such liable to his creditors and at liberty to sue his debtors. This combination in the person of the Roman heir of the functions of a testamentary executor and of a 'personal representative' was destined to have great influence in the future over the position of the executor as he grew out of Germanic law.

The payment of the legacies was the heir's duty and was secured by an ample supply of legal remedies. In the time of Justinian the legatee might choose from among three different forms of action in order to compel the payment of his legacy. He could always bring a *condictio*, called in this case the *actio ex testamento*, which was a personal action to compel the heir to hand over to him the subject of the legacy with all its accessions. This action was held to arise *quasi ex contractu*². In the case of an unconditional legacy of a specific piece of the testator's property the legatee could bring a *vindicatio* or real action for its recovery, not only against the heir but also against any one in whose possession it might be found, for it was held in such a case that the property in the legacy passed to the legatee immediately on the coming of the will into operation, that is as soon as the instituted heir had accepted the inheritance³. Finally Justinian by one of his constitutions⁴, besides greatly simplifying the law as to legacies, gave the legatee a statutory *hypotheca* over the property belonging to the inheritance, which he could enforce by means of an *actio hypothecaria* or *utilis Serviana*. This action would be of special value to the legatee in cases where he could not avail himself of the *vindicatio rei*.

When a legacy was left subject to a condition or to be paid at a future time or was disputed the legatee could in most cases require the heir to give security for the payment of the legacy on the fulfilment of the condition or the lapse of the fixed period of time or the settlement of the dispute in favour

¹ D. 50. 16. 24.

³ D. 47. 2. 64; D. 31. 80; Gaius 2. 194.

² Inst. 3. 27. 5; D. 44. 7. 5. 2.

⁴ Cod. 6. 43. 1.

of the legatee. If the heir refused to give this security the legatee could claim to be put in possession of the inheritance¹ and in certain cases in possession of the heir's own property². This *immissio Antoniniana*, as it was called from the name of the Emperor who first allowed it, could be claimed when the heir was still unwilling to give the requisite security six months after the legatee had been put into possession of the inheritance.

The burden of the testator's funeral and its attendant expenses rested primarily on the heir, if no special provision was made for it in the will. If the testator named a person to carry out the duty and this person failed to do so it devolved on the heir, and no penalty could be inflicted on the recalcitrant nominee except the loss of any recompense that might have been assigned to him in the will for his trouble³. The funeral expenses could be recovered by those who incurred them from the heir or the person specially delegated by the testator by an action founded on the Praetor's edict⁴.

All the functions, therefore, which in modern English law regularly fall to the lot of the testamentary executor, were thrown by the Roman law on the shoulders of the instituted heir. The Roman *heres*, as has often been remarked, combined the positions of the English executor and the residuary legatee, with this important modification, that by the general rule of law his liability for the testator's debts was not limited to the amount of the assets that came to his hands. In order to give him an opportunity to avoid any loss that he might otherwise incur under this rule the heir was allowed to deliberate whether or not he should accept the inheritance; the creditors of the estate could apply to the Praetor to fix a limit of time within which the heir must make his decision, and this interval was called *spatium deliberandi*⁵.

It might be that after all his calculations of the probable outgoings and incomings of the estate the heir was at the end

¹ D. 36. 4. 5. pr. and 5.

² D. 36. 4. 5. 16.

³ D. 11. 7. 12. 4.

⁴ D. 11. 7. 12. 2 "quod funeris causa

sumptus factus erit, ejus recipiendi nomine in eum, ad quem ea res pertinet, judicium dabo."

⁵ D. 28. 8. 1. 1.

of his *spatium deliberandi* still doubtful of its solvency. In this case he could enter into an arrangement with the creditors to accept the inheritance as their mandatary on condition that they would make good to him any loss he might thereby incur. He could compel them to keep their agreement by an *actio mandati contraria*¹. Or he could make an agreement with the creditors to pay them each a certain proportion of their claims²—"so much in the pound." In making such an arrangement the decision of the majority of the creditors bound the minority, the majority being reckoned not by the number of persons but by the amount of money owing to them³.

By one or other of these means the heir could avoid the possibility of incurring a loss by the acceptance of the inheritance, if he could come to terms with the creditors. Justinian by a famous enactment⁴ opened to him an avenue of escape from pecuniary loss without the need of getting the creditors' consent. The Emperor Gordian had already allowed soldiers the privilege of exemption from liability beyond the amount of the assets for the debts of a testator by whose will they were instituted heirs. This privilege Justinian now made general subject to the observance of certain formalities which had not apparently been required in the case of soldiers. To obtain the benefit of this enactment the heir had to draw up an inventory of all the property of the deceased, after making provision for the funeral expenses and the cost of the insinuation of the will and of making the inventory. He must begin his task within thirty days from the opening of the will and finish it within another sixty days, unless at the time the will was opened he happened to be at a distance from the place where the greater part of the property was situated; in that event he was allowed one year. The inventory had to be drawn up in the presence of notaries and signed by the heir in signification of the correctness of the quantities given and his good faith in making the list complete. While the inventory

¹ D. 17. 1. 32.

valiturum est."

² D. 2. 14. 7. 17 "Si ante aditam hereditatem paciscatur quis cum creditoribus ut minus solvatur, pactum

³ D. 2. 14. 8 and ib. 10. pr.

⁴ Cod. 6. 30. 22.

was being drawn up no creditor or legatee was allowed to bring an action against the heir, or to assert his right to any part of the inheritance by a *vindicatio* or an *actio hypothecaria*. When the inventory was completed the heir could safely proceed to pay the creditors and legatees, in the order in which they applied to him, without fear of being called on to make good any deficiency out of his own pocket. If the assets were exhausted before all the creditors were paid the unpaid ones could resort to any legatees who had already received their legacies, and recover the amount of the debt from them either by an *actio hypothecaria* or a *condictio indebiti*. Unpaid creditors having a *hypotheca* over property belonging to the inheritance could recover their debts from any previously paid creditors who had no such security. In no case could the unpaid creditors recover anything from the heir after he had paid away all the assets mentioned in the inventory.

If, on the other hand, the heir neglected to make the inventory within the time allowed he was held to have accepted the inheritance unconditionally and was liable in full to the creditors, unless he had sought and obtained a *spatium deliberandi* under the old rule. If he had done this and before the end of the interval allowed, which Justinian limited in ordinary cases to nine months, accepted the inheritance, he was still liable for the full amount of the debts. He could of course combine the *spatium deliberandi* with the *beneficium inventarii* and its advantages provided he carefully observed all the rules. In any case it would be a superfluous proceeding to apply for permission to deliberate after the introduction of the inventory, but Justinian thought it necessary to provide for those who might be induced to do so by their excessive caution and timidity.

It need scarcely be pointed out that the *beneficium inventarii* together with the effect of the Lex Falcidia in securing to the heir one-fourth of the inheritance must have aided powerfully in securing the execution of wills by providing inducements for the instituted heir to accept the inheritance.

Further guarantees for the due execution of the testator's wishes were afforded by the formalities imposed on the opening,

inspection and preservation of wills. The aperture of a will was required to be made as soon as possible after the testator's death, three to five days being allowed if all the interested parties were present on the spot, otherwise three to five days after they had all assembled¹. The will was brought before a magistrate and the witnesses who had sealed it were bound to come forward and acknowledge their seals, or declare, if such were the case, that they had been tampered with². If some of the witnesses were at a distance and unable to come to the opening the will was sent to them to acknowledge their seals. If none of the witnesses could be present and the opening of the will was urgent it could be done in the presence of men of good reputation who, after inspecting the will and making a copy, sealed it and sent it to the original witnesses for acknowledgment³.

After the acknowledgment of the seals the cord fastening together the tablets on which the will was written was broken, the tablets were opened and the will read aloud. Then a copy was made, and finally the original was again sealed up, this time by the magistrate with the public seal, and deposited in the public archives, so that if by any mischance the copy was lost another could easily be made⁴. The original could at any time be inspected and a copy of it made by any one of the public who cared to apply to the magistrate for the purpose⁵. If the will had been drawn up in duplicate, the full formalities being observed in each case, the public aperture of one was sufficient. But if the second was a mere informal copy of the original the aperture of the latter only was valid⁶.

As all these formalities were gone through in public it was impossible for a dishonest heir to conceal the provisions of a will. All he could do was to try to defeat them by delays and evasions. To prevent such malpractices was frequently the object of imperial constitutions, especially in regard to a kind of legacy which became very frequent after the Empire had

¹ Pauli Sententiae 4. 6. 3.

⁴ Paul. Sent. 4. 6. 1.

² Paul. Sent. 4. 6. 1 and 2; D. 29.

⁵ D. 29. 3. 1. pr.

3. 4 and 5.

⁶ D. 29. 3. 10. pr. and ib. 12.

³ D. 29. 3. 7; Cod. 6. 32. 2.

become Christian, legacies, namely, *ad pias causas*. Thus in Nov. 1. 1. 1. Justinian enacts that an heir who after being admonished by the magistrate neglects for the space of one year to carry out any disposition of the will shall forfeit any benefit he would otherwise be entitled to under the will beyond the fourth part secured to him by law. The share of the property which he thus forfeited devolved on any other instituted heirs who had accepted; failing them it went to the legatees and slaves to whom their liberty had been bequeathed; provided in every case that the recipients gave security that they would carry out that particular provision of the will.

The payment of legacies *ad pias causas* was also enforced by making the action for their recovery a case of *lis crescens*, that is an action in which an unsuccessful defendant must pay double the sum claimed¹, and by making them payable even out of the heir's *quarta Falcidia*, if he excused the non-payment by saying there was nothing of the inheritance left².

In spite, however, of the rules securing the publicity of wills and enforcing the execution of their provisions there were some testamentary dispositions whose execution it was found very difficult to ensure. These were of two kinds. In some cases a testator would leave in his will a direction for something to be done without charging any specific person with the duty of seeing it carried into effect, such a direction, for example, as

“Filii filiaeque meae ibi sunt, ubi eos mater sua esse volet, eisque heres meus in annos singulos inque pueros puellasque singulas damnas esto dare cibarii nomine aureos decem.”

If the children's guardians did not provide the money there was no one who could bring the *actio ex testamento* to enforce the provision. Such directions in wills were described by Pomponius³ as “*quae ad auctoritatem dumtaxat scribentis referuntur nec obligationem pariunt.*” No legal obligation arose out of them, but Pomponius thought they should be enforced by the intervention of the magistrate—“*et in omnibus ubi auctoritas sola testatoris est, neque omnimodo spernenda*

¹ Inst. 3. 27. 7; ib. 4. 6. 19; Cod. 1. 3. 46. 7.

² Nov. 131. 12.

³ D. 33. 1. 7.

neque omnimodo observanda est. Sed interventu judicis haec omnia debent, si non ad turpem causam feruntur, ad effectum perduci¹." Of a similar kind were directions, given indeed to a certain person named in the will, which yet could not be enforced in the courts; for example, a direction to the testator's heir to erect a monument to him at a certain cost. There was no legal obligation to carry out a direction of this sort, because there was no one who could bring an action on it, according to the Roman principle that where there is no remedy there is no right and therefore no obligation².

The second group of cases in which the Roman system of executing wills was found defective consisted of those in which, though the direction was given to a certain person and there was a legal remedy provided for enforcing it, the limits allowed to the person charged enabled him to prejudice the beneficiary seriously by delays; for example, a direction to an heir or legatee to spend a certain sum of money in founding a new charitable establishment.

The vice of the Roman system lay in this, that the execution of a will was thrown upon the shoulders of persons who would benefit by disobeying the directions of the testator. That the system worked as well as it did must be attributed partly to the stringent legal provisions mentioned above, partly to the superstitious regard which the Romans paid to the wishes of the dead. But even these powerful influences were not always strong enough, and the need was certainly felt of the introduction of some disinterested outsider who could undertake the duty of superintending the execution of the will. Accordingly we find even before the time of Justinian enactments throwing on third parties, generally public officials, the office of carrying out the provisions of wills. But the intensely conservative spirit of Roman law, the disinclination to make sweeping changes or do more than was required to remedy the grievance of the moment, the most striking manifestation of which is found in the history of the Praetor's edict, was still strong and these enactments brought about nothing like a general introduction of any institution

¹ D. loc. cit.

² Poste's Gaius p. 458.

corresponding to the modern executor. It was found that a particular kind of legacy was frequently defeated by the self-interest of heirs, and accordingly a remedy was provided, as a rule by making it the duty of some public official to see to the matter. To take an instance already mentioned, that of the heir who refuses to erect a monument to his testator, the bishops and imperial magistrates are to take steps to compel the delinquent to perform what is morally though not hitherto legally his duty¹. Again, the extraordinary jurisdiction of the Praetor was made use of to compel the execution of a mandate given by the testator to a legatee to see to his funeral², and of a request to the legatee to emancipate his children in consideration of the legacy³. It will be noticed that in all these cases in which public officials were employed religious or public interests were concerned directly or indirectly.

Two passages in the Digest show traces of what we may call a special private testamentary executorship.

(a) "Si quis Titio decem legaverit et rogaverit, ut ea restituat Maevio, Maeviusque fuerit mortuus, Titii commodum cedit, non heredis, nisi dumtaxat ut ministrum Titium elegit⁴."

Here evidently since the unappropriated money does not revert to Titius if he is a mere *minister* as it would if he were a legatee on whom a similar charge had been imposed we may regard him as an executor specially appointed to carry out the bequest to Maevius.

(b) "'A te peto, Titi, fideique tuae committo, uti curam condendi corporis mei suscipias, et pro hoc tot aureos e medio praecipito.' Quaero, an, si Lucius Titius minus quam decem aureos erogaverit, reliqua summa heredibus proficiat. Respondi, secundum ea quae proponerentur, heredum commodum proficere⁵."

Here again Titius is merely an executor *ad funus faciendum*.

¹ D. 5. 3. 50.

⁴ D. 31. 17. pr.

² D. 11. 7. 14. 2.

⁵ Scaevola, in D. 31. 88. 1.

³ D. 35. 1. 92.

Somewhat similar traces of an undeveloped testamentary executor are found in some passages of the Digest relating to the survival of a contract of mandate after the death of the mandator. A mandate to build a monument to the mandator was good, and the heir could bring the *actio mandati* to compel its performance, while the mandatary could recover from the heir any expenses incurred in carrying out the contract¹.

Another passage that has sometimes been adduced as showing something like a testamentary executor is D. 30. 107. It is a passage from Africanus referring to the case of a testator selecting one of several co-heirs to pay the legacies.

“Si a pluribus heredibus legata sint eaque unus ex his praecipere jubeatur et praestare, in potestate eorum quibus sit legatum, debere esse ait, utrumne a singulis heredibus petere velint an ab eo, qui praecipere sit jussus: itaque eum qui praecipere jussus est cavere debere coheredibus indemnes eos praestari.”

The passage affords but feeble support to those who would seek the testamentary executor in Roman law. The heir who is directed to pay the legacies is none the less for that a true Roman *heres*—the only difference between him and the ordinary *coheres* is that he has to bear the whole instead of only his proportional share of the legacies, just as if he were sole heir. Such a selected heir was called a *dispensator legatorum*.

The instances quoted so far are concerned only with the execution of some special provision of the will. For anything like a universal executorship we must go to the legislation of Justinian. A benevolent testator wishing to devote his whole substance, say, to the release of captives, was in this dilemma. If he instituted an heir in the ordinary way and charged him to devote the whole estate to the object in view the heir could always retain the Falcidian fourth at the expense of the objects of the testator's charity. If on the other hand he directly instituted the captives as his heirs, leaving them

¹ D. 17. 1. 12. 17; ib. 13; D. 11. 7. 14. 2; D. 17. 1. 26. pr.; ib. 27. 1.

the whole of his property, the will was liable to be held void on account of the uncertain identity of the instituted heirs. To get over the difficulty Justinian ordained¹ that where captives or the poor had thus been instituted heirs the bishop of the testator's last domicile or his *oeconomus* should take possession of the inheritance and employ it for the purpose for which it was destined, retaining no profit for himself. But although he might not retain the *quarta Falcidia* the bishop or other official stood *in loco heredis* to this extent, that he was liable to the creditors for the testator's debts and entitled to sue his debtors. The bishop might delegate his functions to clergy chosen by himself, but it was his duty to enforce stringent regulations to prevent his subordinates from making private gain out of their charge.

This constitution marks the limit reached by the classical Roman law in the direction of a universal executorship, and even this is not a true executorship in the modern sense, for, firstly, it may be regarded in some sense as not really universal but special, since it relates to the whole of the testator's estate only because he has devoted the whole to one purpose, and that a purpose of a very special kind, namely religious; and secondly, the testator did not himself appoint the executor—in the language of the German jurists of the eighteenth century the bishop was *executor legitimus*, not *executor testamentarius*.

Justinian's policy of charging the bishops with the superintendence of the execution of particular pious bequests² has already been alluded to³.

Scanty as are the evidences in Roman law of anything approaching the modern institution of testamentary executors, some writers have maintained that in them the origin of the institution is to be found. M. Arntz⁴ says—

“C'est une opinion généralement répandue que l'institution des exécuteurs testamentaires est d'origine française, et que c'est de l'ancien droit coutumier qu'elle a passé dans le droit

¹ Cod. 1. 3. 49.

³ Above, p. 9.

² Cod. 1. 3. 28. 1; Nov. 131. 11 and

⁴ Cours de droit civil français § 2110.

écrit...Mais cette opinion n'est point justifiée. On ne saurait indiquer, pas même approximativement, ni la date ni le lieu de l'origine coutumière des exécuteurs testamentaires. Elle est donc tout au moins douteuse. Nous croyons que le doute s'évanouit devant les documents de l'histoire, que cette institution est d'origine romaine, et que, par l'influence de l'Église et du droit canon, elle s'est répandue, développée et introduite dans les pays coutumiers."

The evidence for the Roman origin of the institution has been discussed above and found not strong enough to support M. Arntz' conclusion—it is to the "documents of history" that German investigators point, and as we must hold rightly point, for proof of the Germanic origin of the executor¹. The desire to find a Latin origin for all their institutions, which discounts so heavily from the value of much recent French work, has blinded M. Arntz to the truth.

¹ See next chapter.

CHAPTER II.

THE ORIGIN OF THE TESTAMENTARY EXECUTOR.

THE much quoted *nullum testamentum* of Tacitus remained for long ages after he wrote it a faithful description of the stage at which the various Germanic tribes had arrived in the slow transition from the state of society in which the family is the unit and its claims are supreme to that in which a man's own free will is allowed some play in determining the fate of his substance after his death¹. The different tribes emerged from that state at different periods, and herein, as we should expect, progress was most rapid in the tribes that settled within the old borders of the Roman Empire in Italy, Gaul and Spain. Beyond those limits the true 'last will' does not appear as a permanent legal institution among laymen till the latter half of the twelfth century² in Germany. In Britain, which, though strictly speaking within the boundaries of the Empire, must practically be treated as a new country like Germany owing to the almost complete disappearance of Roman civilisation during the invasions, it is doubtful according to the latest authorities whether the traces of the testament to be found before the Norman Conquest are not rather manifestations of the peculiar privileges of a class than evidence of the generality of the practice of testamentary disposition.

¹ Heusler, *Institutionen des deutschen Privatrechts* II. 621; Palumbo, *Testamento Romano e Testamento Longobardo* 239.

² Beseler in *Zeitschrift für deutsches Recht* IX 144; Walter, *Deutsche Rechtsgeschichte* 636; Schröder, *Deutsche Rechtsgeschichte* 701.

14 *The Origin of the Testamentary Executor.*

Legal development was more rapid in this particular in those tribes which were in the midst of a large conquered population and subject to the powerful influences of Roman civilisation and law and of the Christian Church. The Gothic tribes who were the first of the Germanic peoples to come into close contact with the Romans were also the first to adopt the testament¹. Thus in the *Edictum Theodorici* (A.D. 511-515)² we read (c. 28)

“Faciendorum testamentorum omnibus quos testari leges permittunt, damus late licentiam³.”

The *Lex Wisigothorum* (A.D. 466-484)⁴ recognises the testament—

iv. 2. 20. “Omnis ingenuus vir atque foemina, sive nobilis sive inferior, qui filios vel nepotes aut pronepotes non reliquerit, faciendi de rebus suis quicquid voluerit, indubitanter licentiam habebit⁵.”

The *Lex Burgundionum* (A.D. 480-500)⁶ supplies similar evidence—

43. 1. “Hoc ordine in populo nostro donationes factae et testamenta valebunt ut quinque aut septem testes donationi aut testamento, prout possunt, aut signa aut subscriptiones adjiciant. Quod si minor testium numerus interfuisse probetur facta donatio aut conditum testamentum nullam habere poterit firmitatem.”

60. 1. “Si quis posthaec barbarus vel testari voluerit, vel donare, aut Romanam consuetudinem aut Barbaricam esse servandam sciat.”

The laws of the Salian Franks (A.D. 486-511)⁷ do not allude to testaments, and those provisions of the laws of

¹ Palumbo 307 ff.

² Brunner, *Deutsche Rechtsgeschichte* i 365.

³ Zoepfl, *Deutsche Staats- und Rechtsgeschichte* i 126, n. 3, takes this to apply only to the native Roman inhabitants of Italy, but Palumbo loc. cit. seems to show satisfactorily that

it applied also to the Ostrogoths.

⁴ Brunner i 321.

⁵ See also *Lex Wis.* ii 5 and Edict. Eur. ix. “si voluerit, dum sanus est, per donationis chartulam aut moriens per testamentum.”

⁶ Brunner i 335.

⁷ Brunner i 297.

their Ripuarian kinsmen which appear at first sight to treat of them¹ in reality, it is most probable, refer not to testaments but to donations *inter vivos*². Yet from other evidence we know that during the sixth century the Franks made use of testaments. An edict of Chlothar II of 614 A.D. contains the following passage—

“Cuicumque defuncto, si *intestatus* decesserit, propinqui absque contrarietate iudicium in ejus facultates juxta legem succedant³.”

Among the Lombards testaments were first recognised by Liutprand in 713 A.D.⁴

Leges Longob. Liutp. 6⁵. “Si quis langobardus, ut habens casus humanæ fragilitatis egrotaverit, quamquam in lectolo rejaceat, potestatem habeat, dum vivit et recte loqui potest, pro anima sua judicandi vel dispensandi de rebus suis, quid aut qualiter cui voluerit; et quod judicaverit, stabilem debeat permanere⁶.”

It is not necessary to enlarge here on the motives which may have actuated these different tribes in thus early adopting the last will. Undoubtedly religious influences played a very conspicuous part and to these we may add the desire to correct the inequity of the rules of intestate succession⁷.

But besides the testament borrowed from the Romans, the Germanic peoples developed out of their own native law

¹ Titles 59 and 60.

² Glasson, *Histoire du droit et des institutions d'Angleterre* i 132, “à cette époque on désignait sous le nom de testament tout acte écrit qui avait pour objet de déroger à la loi générale de successions.”

³ See also Greg. Tur. *Hist. Franc.* vi 46, and various documents, e.g. Marc. form. ii. 12, 17, 37 etc. Below, p. 79.

⁴ Palumbo 314.

⁵ In Pertz, *Legum* iv 109.

⁶ Savigny, *Geschichte des römischen Rechts im Mittelalter* ii § 78. Beseler, *Lehre von den Erbverträgen*

i 124. Pertile, *Storia del Diritto Italiano* iv 12. Palumbo 315 ff. gives reasons for thinking that the passage indicates the recognition of a true testament, not merely of a modification of the *thinæ* for a sick man, as Beseler held. Schultze, *Die langobardische Treuhand* 14 ff., on the other hand, holds that there was no general recognition of unilateral testamentary dispositions in Lombard law.

⁷ Palumbo 323. For the influence of Roman texts and forms on the wording of Liutprand's law, see Schultze 14.

dispositions *propter mortem* of a less advanced kind, which within the old boundaries of the Empire existed for some time side by side with the borrowed testament and beyond those limits were for many centuries the only dispositions of the kind known. It is necessary to inquire here into the nature and history of these Germanic institutions because it is out of them and not directly out of the Roman will that there ultimately grew the institution of the testamentary executor.

The dispositions *propter mortem* in question were of two kinds. Of these the more primitive form is what German writers call by the generic name of *Erbvertrag*¹. The *Erbvertrag* appears in Frankish law as *Affatomie*, and in Lombard law as *Thinx* or *Garethinx*².

*Affatomie*³ was the adoption of an heir by a childless man. The *Lex Ripuaria* (c. 48) speaks of "adoptare in hereditatem vel *adfutimi*." Such an adoption was probably originally permitted only when there were no kinsmen in existence to whom the inheritance would pass by the ordinary rules of succession⁴. Later it was allowed in all cases except when children were living⁵. The subsequent birth of an heir rendered the transaction void⁶.

The formalities of the *affatomie* are prescribed by title 46 of the *Lex Salica*⁷. They fall into three stages. (a) The *mallus* is convened by the *tunginus* or the *centenarius* and the adopting party appears before it with a person who is a stranger to his family (*qui ei non pertinet*). Into the bosom

¹ Palumbo 244, "abbiamo qui un esempio dei *patti ereditarii*, che apparecchiaron nel diritto germanico l'introduzione dei testamenti, alla cui mancanza, si suppliva con tali forme di contratti."

² Schröder 328, "Gelegentliche Quellenzeugnisse lassen daraufschliessen, dass das auf diese Weise ausgebildete Erbschaftsgedinge Gemeingut der germanischen Stämme gewesen ist. In greifbarer Gestalt liegt es uns in dem frankischen *adfatus* und dem

langobardischen *garethinx* (*thinx*, *thingatio*) vor."

³ Heusler II 621 ff.; Schröder 328—330; Palumbo 240 ff.

⁴ Heusler 622; Palumbo 240.

⁵ Marc. form. II 13, "Dum...diu orbatus a filiis...in loco filiorum meorum visus sum adoptasse."

⁶ Schröder 329.

⁷ The *affatomie* was originally accomplished by a single act, from which the triple ceremony of the *Lex Salica* was a development. Schröder 329.

of this stranger he throws a wand (*festuca*) announcing what proportion of his property he wishes to give to the person to be adopted¹. (b) Next the stranger goes into the adopter's house and by way of taking possession of the part of the inheritance which is to go to the adopted heir remains there for three days (*sessio triduana*) entertaining guests who must be at least three in number. (c) Finally the intermediary within twelve months transfers the property of which he has so taken possession to the adoptive heir in the *mallus* or before the king with the same formalities as were observed in the first stage. Each of the three stages in the proceedings must be proved, if the rights of the adoptive heir are subsequently called in question, by the evidence of three different witnesses².

The proceedings, or to speak strictly the last of the three stages in the proceedings, required the consent of the people or the king because as a consequence of it the State lost its right to the property of a man dying without kindred³. According to the Riparian law the *affatomie* took place, not in the *mallus* but only before the king, a result of the growth of the royal power⁴.

The effect of an *affatomie* was to give the adopted heir all the rights of an heir by birth⁵. During the life of his adoptive parent he had all the rights of forbidding the alienation of certain kinds of property which belonged to an heir by birth, and after the former's death he became his universal successor so far as the portion of the inheritance to which he was admitted was concerned and thus so far liable for the debts of the estate⁶.

¹ The use of the *festuca* is a relic of a more ancient state of things when a spear was used. "Bedeutend abgeschwächt nach Form und Inhalt war die Sache bei den Franken schon zur Zeit der Lex Salica," Schröder 329.

² Lex. Sal. 46; Heusler II 621—2; Palumbo 241 ff.

³ "Der Hauptakt für den Uebergang des Vermögens ist nicht die Bestellung des Salmanns, sondern die definitive

Tradition seitens der letzteren an den Destinatar; sie, nicht jene, bedarf der Erlaubniss des Volks oder des Königs und muss daher im echten Ding oder vor dem König stattfinden." Heusler II 624; see also Palumbo 244.

⁴ Lex. Rip. 48 "in praesentia regis."

⁵ Heusler II 624; Schröder 329.

⁶ Zoepfl II § 115. Heusler II 624—"Wird nun durch dieses Rechtsgeschäft eine wirkliche Universalsuccession

The Lombard *thinx* or *garethinx* corresponds in almost every particular to the Frankish *affatomie*. It, also, was the adoption of an heir and could take place only in the absence of sons or parents¹. The *thinx*, also, required the consent of the people—the word *thinx* or *garethinx* denotes the public assembly². Like the *affatomie*, again, the *thinx* could not relate to single pieces of property but only to the whole or an aliquot part of a man's estate³. The *thinx*, too, was in most cases irrevocable⁴.

As to the requisite solemnities, the *thinx* took place originally before the popular assembly from which it derived its name, but in the time of Rotharis the assembly was represented by a small number of freemen⁵. In the twelfth century two or three witnesses were required⁶.

The chief difference between *affatomie* and *thinx* seems to be that while the *affatomie* was used only for the adoption of an heir to succeed the adopting party after his death, the *thinx* was used for gifts *inter vivos* as well—indeed the latter is the earlier form⁷. The *thinx* as the adoption of an heir is distinguished by the use of the word '*lidinlaib*' by the adopter in the proceedings before the assembly⁸. In the

hergestellt, nicht Singularsuccession in einzelne Gegenstände des Nachlasses." Palumbo 244—248.

¹ Edict. Rothari 168, 170 in Pertz iv 39. Palumbo 251 "La thinx avea, similmente, carattere adottivo," ib. 251 "La thinx importava anch' essa la designazione contrattuale di un erede."

² Palumbo loc. cit.

³ Palumbo 252 "La thinx, come l' adfatimus, non si referiva a singole cose, ma abbracciava o tutta la sostanza del donante o una quota parte di essa." Schultze 7.

⁴ Edict. Rothari 174. Pertz, Legum iv 40. "Non leciat donatori ipsum thinx quod antea fecit iterum in alium hominem transmigrare, tantum est, ut illi qui garethinx susceperit, tales culpas non faciat donatori suo, quales solent ingrati filii parentibus suis

facere, per quas exhereditantur." One of these *culpa*e was the refusal to succour the donor in time of need, Edict. Rothari 173 loc. cit.

⁵ Edict. Rothari 172 loc. cit. "non absconse sed ante liberos homines." Palumbo 264.

⁶ Palumbo 266.

⁷ Palumbo 257—8; ib. 262 "E ammessa la thinx fra vivi come prima forma della donazione longobarda, si spiega mirabilmente come nacque la thinx lidinlaib...Le tingazioni tra vivi si trasformarono in veri contratti ereditarii." Cf. the development of the Roman *familiae Mancipatio*.

⁸ Edict. Rothari 173 loc. cit. "Si quis res suas alii thingaverit, et dixerit in ipso thinx lidinlaib, id est quod in die obitus sui reliquerit: non dispergat res ipsas postea doloso animo nisi fruatur eas cum ratione."

latter form the *thinx* like the *affatomie* conferred on the adopted person all the rights of an heir by birth¹. In both forms it created a universal succession².

We have now to consider the second form in which Germanic law enabled a man to influence the disposition of his property after his death³. This is the *Vergabung von Todes wegen*⁴.

The *Vergabung von Todes wegen* in its original form was a conveyance by a donor of a single piece of property (not of a man's whole estate, *rerum universitas*) to the intended beneficiary, with a reservation to the donor of the enjoyment of the property during his life. Heusler⁵ distinguishes three different forms of the *Vergabung von Todes wegen*.

(a) In the first form the donor conveyed the property to the donee by *traditio* and *investitura*; the donee entered into possession and after a *sessio triduana* redelivered it to the donor as a *beneficium*. The following extract from a document of 713 A.D. will illustrate this form.

Donavi ad monasterium...trado atque transfundo donatum-
que in perpetuum esse volo *a die presenti*, hoc est in villa...
totum et integrum...una cum mansis domibus (etc.)... ad in-
tegrum ad supradictum monasterium dono atque transfundo
ad possidendum ea vero ratione ut, dum advixero, usufructuario
ordine debeam possidere, post obitum quoque nostrum...in
vestram recipiatis potestatem⁶.

¹ Palumbo 264 "Con la *thinx* lidin-laib...il tingato non diveniva vero erede che alla morte del tingante, ed allora solamente entrava in possesso delle cose donate, e potea erigere i crediti, e soddisfare le obbligazioni."

² Palumbo loc. cit. Edict. Roth. 174 "Ipse autem qui *garethinx* susceperit ab alio, quicquid reliquerit donator in diem obitus sui, habeat licentiam in suum dominium recolligere et debitum creditoribus reddere et ab aliis exegere; et quod in *fiduciae nexum* positum est, reddat debitum, et requirat rem in *fiduciae nexu* positam."

³ Heusler II 624 points out that the

affatomie is something more than a mere *Vergabung von Todes wegen*—it is the creation of an heir.

⁴ It seems better to use the German phrase than a translation. "Donatio propter mortem" suggests too many misleading Roman associations; "post-obit gift" the nearest English equivalent will not answer the purpose because one only of the forms of the *Vergabung von Todes wegen* was what we generally understand by a 'post-obit gift.'

⁵ II 118 ff.

⁶ Loersch und Schröder, *Urkunden zur Geschichte des deutschen Rechts*, 1st ed. no. 21.

(b) The second form was that of a mere post-obit gift, with a *traditio* but no *investitura*. The following document belongs to the year 806 A.D.

Ego, in Dei nomine, Adalhram trado ad monasterium Sancti Galli quicquid in die exitus mei de hac luce in pecuniali causa non datum et non usatum reliquerim.....ut nullo contradicente quicquid, ut jam diximus, in die obitus mei reliquerim, ad eundem cenobium, permaneat stabilitate perpetua ad habendum¹.

In both these forms (a) and (b) the donor has the juristic possession of the property till his death; in the first case because it reverts to him in consequence of the feoffment to him as a *beneficium*, in the second case because he has never parted with it. The donee in both cases has the *nuda proprietas* only till the donor's death.

(c) The third form does not occur, according to Heusler, before the middle of the ninth century. It follows generally the first form but the donor receives the property back only on condition of paying a rent, whence this form is called *census pro investitura*.

For example—

Ego, in Dei nomine, Hugibreht trado ad monasterium Sancti Galli...quicquid proprietatis vel conquisitionis in pago Prisigauge habere dinoscor...sub ea convenientia ut easdem res ad me recipiam et annis singulis inde *censum* persolvam, id est 2 denarios vel in alio precio taxato, et ut cum eisdem rebus plagitatum habeam tantum tempus vitae meae a parte Sancti Galli beneficium, quod inde visus sum modo habere². A.D. 862.

The *census pro investitura* is distinguished by Heusler from the first two forms by the fact that the donor retains until his death only the physical detention of the property—he is a mere “Verwalter eines fremden Gutes.” The donee has juristic possession and he alone can take legal proceedings in respect of the property. Schröder³ reduces Heusler's three forms to one, at any rate for the period before the tenth century. The mere

¹ Loersch u. Schröder no. 34.

² Loersch u. Schröder no. 51.

³ 275 ff. and esp. no. 140.

post-obit gift in which no possession passes to the donee till the death of the donor he rejects altogether. The other two forms he regards as one and the same, disputing Heusler's distinction between the feoffment with and the feoffment without the reservation of a rent in respect of the whereabouts of the juristic possession. In every case, Schröder holds, the possession must pass to the donee and then back again to the donor. The appearance of the three different forms in the documents Schröder attributes to the neglect of the scribes who drew them up to insert a record of all that was done in each case; sometimes they laid stress on one, sometimes on another of the different parts of the transaction¹.

Vergabungen von Todes wegen were thus in reality gifts *inter vivos* and were subject to all the restrictions imposed on the alienation of property². In the case of immovables the consent of the donor's heirs was required³. This rule was relaxed in favour of gifts to the Church in 818 A.D. by Louis I⁴. Gifts of movable property were subject to two conditions. The donor must be in sound health at the time of making the gift, and the possession must pass at once to the donee and not revert to the donor—"donner et retenir ne vaut⁵." This last requirement of course put an obstacle in the way of Vergabungen von Todes wegen of movable property. How that obstacle was evaded we shall see later on.

The difference between the Frankish *affatomie* or the Lombard *thinx* and a Vergabung von Todes wegen is patent. The Vergabung related only to one separate and distinct piece of property; the *affatomie* to the whole or an aliquot fraction of a

¹ Schröder 276, "Dabei wurde kein Unterschied gemacht, ob die Leihe zinslos oder mit Auferlegung eines Zinses, der fast immer ein blosser Anerkennungszins von geringem Betrage war, erfolgte: in beiden Fällen fand ausdrückliche Besitzzeineräumung an den Beschenkten und Rückgabe des Besitzes an den Schenker statt, und eine Verschiedenheit bestand nur darin, dass bei zinsloser Leihe eine

Entziehung des Gutes bloss wegen Verschlechterung desselben eintreten konnte, bei Auferlegung eines Zinses dagegen auch wegen unterbliebener Zinszahlung."

² Heusler II 120.

³ Heusler II 54; Zoepfl II § 115.

⁴ Zoepfl loc. cit.; Schröder 262, 269.

⁵ Heusler II 197 ff.

man's estate. The Vergabung brought to the beneficiary under it no further rights or liabilities than were immediately connected with the particular property which he received—it was in fact a case of singular succession. On the other hand the *affatomie* was the creation of an heir, a universal successor¹.

The next step we have to consider is the amalgamation of these two distinct institutions, the *affatomie* and the Vergabung von Todes wegen, a process which is assigned by Heusler to the period of the Frankish Empire².

The way was prepared for this by the gradual falling into disuse of the old formalities of the *affatomie*³. The assent of the people dwindled away to a mere witnessing of the transaction by them and then by a few as representatives of the whole. In the Ripuarian law already the *affatomie* can be validly transacted by a writing, or by a mere *traditio* in the presence of witnesses⁴. The written document came in time to call itself the *affatomie*. Thus a man addresses his grandsons—

“Dabo vobis *per hanc affatimum* omni proportionem... quicquid in jam dicto loco genitor vester et filios meos illos et illas dividere et exsequare deberet, vos quoque, nepotes mei, *per hanc affatimum* post diem obitus mei dividere et exsequare faciatis⁵.”

¹ Above p. 17. Beseler, Erbverträge 196 takes the *affatomie* to be a Vergabung von Todes wegen. Stobbe, in Zeitschrift für Rechtsgeschichte VII 408 showed Beseler's mistake and pointed out that it was due to his overlooking the fact that the transaction must be completed within twelve months. But Stobbe himself went wrong in considering the *affatomie* as a mere *donatio inter vivos*. It was much more than this. “Sie ist offenbar mehr als blosser Vergabung von Todes wegen, sie ist eigentliche Creation eines Erben,” Heusler II 624. Le Fort, Des Exécuteurs Testamentaires p. 8, following apparently Beseler, confuses the *affatomie* with the Vergabung von Todes wegen. “Leurs diverses

lois nous en donnent la preuve, et mentionnent cet acte de dernière volonté, soit sous le nom général de Vergabung von Todes wegen, soit sous des appellations spéciales comme *affatomie* (*adfatamine*) chez les Francs, *thynx* et *garathynx* chez les Lombards.”

² Heusler II 626; Schröder 330.

³ Palumbo 249.

⁴ Lex Rip. 59 “per scripturarum seriem seu per tradicionem et testibus adhibitis.” The same happened with the *thinx*, Palumbo 266—7. Cf. the history of the Roman will.

⁵ Rozière, Recueil Général des Formules usitées dans l'empire des Francs du v^e au x^e siècle, I p. 171.

The result of the amalgamation of the *affatomie* and the original Vergabung von Todes wegen¹ was practically a new institution with some of the features of both, though still continuing to bear the name of Vergabung von Todes wegen². The most important consequence of the change was that a Vergabung von Todes wegen could now be made, not only, as formerly, of separate pieces of property but also of a man's whole estate or a fraction of it ("Vergabung von ganzen Vermögen oder von Vermögensquoten"). The Vergabung had absorbed the principles of the *affatomie*³. Another result was that a Vergabung von Todes wegen could now be made of movable property⁴.

The Vergabung in its new shape as in its old was subject to the general restrictions on the alienation of property, e.g. to the condition that the heirs must give their consent to the alienation of real property (Erbeneinspruchsrecht)⁵. The formalities required were those necessary for the conveyance of real property, viz. *traditio* before the court or some public authority (gerichtliche Fertigung). This it was that made a Vergabung von Todes wegen of movable property possible. The transaction in court was regarded as equivalent to an immediate transfer of possession to the donee and thus the rule embodied in the maxim "donner et retenir ne vaut" was evaded⁶.

The donee in a Vergabung von Todes wegen of the whole of an estate was not considered to be the donor's heir, as the donee in the *affatomie* had been⁷. The distinction is seen clearly in this, that the heirs had under all circumstances the right to forbid the alienation of landed property, while the

¹ Schultze 10, 36.

² i.e. as a rule. But occasionally the result was that gifts of single things came to be called *affatomie*. Heusler II 627.

³ "In diesen Vergabungen ganzer Vermögen lebt die alte Affatomie, allerdings verkümmert, fort, denn sie entstammen ihrer inneren Natur nach doch nicht den Vergabungen einzelner Sachen, obschon sie sich denselben vollständig angeschlossen haben; die

Idee, die sie erzeugt hat, stammt vielmehr aus dem Samen der Affatomie," Heusler II 628; see Schröder 330.

⁴ Heusler loc. cit.; Schröder loc. cit.

⁵ Heusler II 631; Schröder 700.

⁶ Heusler II 200.

⁷ "Man konnte sich noch nicht entschliessen, Andere als die Blutsfreunde Erben zu nennen und als solche zu behandeln," Heusler II 641.

donee in a Vergabung had no such right. Yet the latter was held liable for the donor's debts after his death—the debts, it was said, go with the property and follow the donee¹. Thus the Vergabung von Todes wegen in its later form is less than the creation of an heir and yet more than a mere *donatio mortis causa*².

The development of the Vergabung von Todes wegen gave to Germanic law some of the advantages of the Roman testament, and especially was this so when there was combined with it the employment of another ancient institution of German law, namely the *salmann*, so that instead of the property being transferred directly to the beneficiary it was conveyed to a third person with instructions to hand it over to the beneficiary after the owner's death. It is in this application of the *salmann* to the Vergabung von Todes wegen that we must seek the origin of the testamentary executor, and it is therefore necessary to study in some detail the functions and attributes of the *salmann*.

The word *salmann* is not so old as the thing which it denotes³. Beseler had not found it in any document older than A.D. 1108⁴. Heumann derives and defines the word thus in his *Commentatio de Salmannis*⁵:

“Frequentissima ac certissima Salmannorum significatio desumitur a verbo *saellen*, tradere. Illi nimirum sunt proprie personae intervenientes, quarum per manus aliis aliquid datur. Ast, si vox latius accipitur, Salmanni sunt omnes quorum fidei aut fidelibus manibus nonnihil committitur.”

A *salmann*, then, was an intermediary in a conveyance of property, a person to whom property was transferred in trust to reconvey it to some third party. This third party, the ultimate transferee, might be named at the time of the original

¹ Heusler II 641; Schröder 701.

² “Diese Vergabungen ganzer Vermögen sind bezüglich ihrer juristischen Natur noch nicht abgeklärt und jedenfalls noch nicht als Erbverträge unter

ein erbrechtliches Princip gestellt,” Heusler II 642.

³ Heusler I 217.

⁴ Erbverträge I 263 n. 2.

⁵ Heumann, Opuscula 295.

conveyance or not; in the latter case the *salmann* held the property subject to the further instructions of the grantor¹.

The earliest instance known of the employment of a *salmann* is in the Lex Salica c. 46, where the intermediary in the *affatomie* is nothing but a *salmann*, though not yet called by that name².

A good example of the employment of a *salmann* is given by a document of A.D. 910³.

“Ego, Hatto, dei gratia et misericordia dispensante Moguntiaca ecclesiae archiepiscopus...quicquid proprietatis in M. marca et in V. marca...hoc totum in manus Gerhardi comitis et Chunradi comitis dedi, ea ratione ut cum omni integritate ad sepulchrum pretiosissimi Christi martyris Bonifacii in monasterio Fuldensi contraderent....”

Beneath appears the declaration of the two counts who acted as *salmannen*.

“†Signum Gebehardi et Chunradi comitum, qui easdem traditiones rerum *fideli manu* susceperunt, et hoc coram Rege juraverunt, ut eas S. Bonifacio martyri fideliter delegarent et praecepto regio confirmarent.”

Nothing, it will be observed, is said of the motives prompting the archbishop to employ *salmannen* instead of conveying the property directly to the monastery. The reasons might be of various kinds. Frequently it was the absence of the owner which led him to employ a *salmann* to do what he was prevented from doing himself. Thus a man going to war or on a journey would make over his property to a *salmann* with instructions to convey it to some church or other holy foundation in the event of his death, but to deliver it back to himself if he returned safely⁴. For example—

“Trado ad monasterium S. Galli quaedam mancipia...ea ratione ut si de instanti itinere incolumis rediero, easdem res ad

¹ Beseler loc. cit.

² Above p. 17. Stobbe, Zeitschrift für R.-G. vii 408. It has been thought that a trace of the *salmann* is to be found in the Lombard *thinx*. Schultze

38.

³ Gudén, Codex Diplomaticus i no. 4.

⁴ Beseler op. cit. i 264; Heusler i 216.

me recipiam proprio juri subjectas, si ita libitum tunc fuerit; si autem Deo disponente debitum humanum in eodem itinere exsolvero, ad praefatum cenobium omnes supradictae res revertantur.... Signum...Theotbret qui hanc vestituram facere debet" (i.e. as *salmann*)¹.

Again, by means of a *salmann* certain classes, such as the Jews and persons residing in a town of which they were not freemen, who by the strict letter of the law could not themselves hold property, could indirectly get the substantial enjoyment of the privilege denied them, while the public authorities secured the payment of the taxes by holding the *salmann*, who was always a freeman of the town, liable for them².

The only right which the *salmann* acquired over the property was the right to reconvey it according to his instructions³. In a document of 1123 A.D. the right of the *salmann* is defined as "jus et potestatem quam ipse habebat de dando vel contradendo ...quod vulgariter 'sale' vocant⁴." The *salmann*'s authority could not be revoked by a unilateral act of the grantor and therefore no further conveyance of the property could be made without his participation. In one case a man about to go on a journey conveyed his land to a *salmann* in trust to transfer it to a church. Later on he himself in the absence of the *salmann* conveyed the land to the church, but this transaction was held to be of no avail to transfer the property; it had to be repeated with the participation of the *salmann*⁵. But the *salmann* could not refuse his consent to the withdrawal of his authority⁶, and when once he had made the conveyance in accordance with his instructions his rights were completely extinguished⁷.

The strict observance of his instructions was secured by the obligation of the *salmann* to respect the trust (*Vertrauen*,

¹ Loersch u. Schröder no. 50.

² Stobbe loc. cit. 431; Heusler 1 223.

³ Beseler op. cit. 1 267; Stobbe loc. cit. 413—4. What passed between the grantor and the *salmann* was a mere *traditio*, the grantor did not surrender the ownership to the

salmann (Auflassung, *resignatio*), Heusler 1 218—9. Cf. Schultze 64, 66—7, 77 n. 2, 109 n. 6.

⁴ Guden, C. D. 1 n. 25 (b).

⁵ Beseler op. cit. 1 268; Heusler 1 220—1.

⁶ Stobbe loc. cit. 427.

⁷ Beseler op. cit. 1 270.

fiducia) placed in him¹. The property was put under his *manus fidelis*, 'getreue Hand,' and the duties thereby imposed could not be lightly disregarded, though it is not certain whether formal dishonour followed their breach².

If the *salmann* died before exercising his rights they passed to his heir—any inconvenience that might be caused by this rule could be avoided by employing several *salmannen*, any one of whom could effectually make the required conveyance³.

In the great variety of uses to which it was put in the old German law the institution of the *salmann* can only be compared with the Roman *mancipatio*. In Bavaria and Franconia it became the general practice for landowners to appoint a *salmann* for all their lands, who alone could make a valid conveyance of them. As Beseler remarks, this almost filled the place of a public land transfer registry. So widely spread was the custom in those countries that where there happened to be no *salmann* an express declaration to that effect was necessary in making a conveyance⁴.

Another purpose served by the *salmann* was especially useful at a period when the lack of a settled political order rendered private rights insecure. A person wishing to make a conveyance of his lands would choose as *salmann* a powerful noble in order to strengthen the title of the transferee⁵. Closely connected with this use is another group of cases in which the *salmann's* duty was to protect the lands—in such cases he is frequently called *conservator*. The following document will illustrate both of these applications of the *salmann*.

¹ Schultze 66.

² Beseler op. cit. i 267, 281; Heusler i 221. See Schultze 70—1 for the liability of a purchaser from the *treuhänder*—in Lombard law—to have the sale rescinded if the *treuhänder* misapplied the purchase money.

³ Beseler op. cit. 268; Stobbe loc. cit. 427; Schultze 141.

⁴ Beseler op. cit. 271; Stobbe loc. cit. 436; Heusler i 222. In Lombard law it was exceptional for a *salmann* to be employed for the transfer of

property *inter vivos*. Schultze 40.

⁵ Beseler op. cit. 271; Stobbe loc. cit. 429—430; Heusler i 222. The following example is quoted by Kreutzer, de exec. test. and by Beseler i 272 from Monumenta Boica, con. nov. i 2, 272. "Idem castrum...manu propria contulit et donavit, quam etiam donationem per manum Ludowici illustris ducis Bawariae, qui et ejusdem proprietatis est salmannus,...tenetur certissime roborare." A.D. 1207.

“Rappoto, comes Palatinus, vendidit et tradidit domino Chuonrado episcopo Frising. villam Utingen quam hereditarie possedit. Idem etiam comes juramento suo publice declaravit, se nullum habere, qui vulgo Salmann nuncupatur ad superscriptam villam, proinde consensu et voluntate domini episcopi dominum Gebehardum de Tolhe prelegit fore *conservatorem*, et suum constituit esse Salmann prefate villae, simul cum adtenentiis, qui etiam per manum ipsius Tolzenarii traditionem seu venditionem ipsi episcopo corroboravit. In loco venditionis protestatus est idem episcopus, quod si forte ipse intestatus decesserit, quod prenomminatus Tolzenarius sepe dictam villam ad usus ecclesiae beatae virginis *tamquam verus Salmann conservabit simul et defendet*¹.”

The application of the *salmann* with which we are here more particularly concerned, namely to the Vergabung von Todes wegen, dates back to the ninth century, as is shown by many Frankish, Bavarian and Alemannic documents². The Vergabung was not made directly to the beneficiary but to the *salmann*, who was directed to hand over the property to the donee after the donor's death. By this device the donee acquired no right during the life of his benefactor, and since the *salmann* was bound to consent to the withdrawal of his authority if the donor demanded it the disposition became revocable, unlike a Vergabung von Todes wegen pure and simple, while the additional advantage was gained that the *salmann* guaranteed the execution of the donor's wishes³.

¹ A.D. 1244. Heumann p. 303.

² Beseler op. cit. i 278; Stobbe loc. cit. 422 says that the earliest instance in which a *salmann* was used for executing a Vergabung von Todes wegen is in Marc. form. i 13, Loersch u. Schröder no. 13—“veniens ille fidelis noster ibi, in palatio nostro, in nostra vel procerum nostrorum praesentia, villas noncupanter illas, sitas in pago illo, sua spontanea voluntate nobis per fistuca visus est verpisse vel condonasse: in ea ratione, si ita convenit, ut, dum vixerit, eas sub uso

beneficio debeat possidere, et post suum discessum, sicut ejus adfuit petitio, nos ipsas villas fidele nostro illo plena gratia visi fuimus concessisse.” See Schultze 38—9, for evidence that in the 8th century the *treuhänder* was employed to emancipate slaves after the master's death.

³ Stobbe loc. cit. 423 “Die durch den Salmann vermittelte Vergabung den Charakter einer einseitigen letzten Willensordnung erhielt, welche ebenso wie ein Testament widerruflich war.”

The appointment of the *salmann* might be made conditional, or again it might be made free from all conditions, so that he had great freedom in settling the disposition of the property. The latter form seems to have been much affected by churchmen, and here we get the explanation of a much discussed text of Canon Law.

“Qui extremam voluntatem in alterius dispositionem committit non videtur decedere intestatus¹.”

At first sight this looks like a direct contradiction of the Roman principle—

“Satis constanter veteres decreverunt testamentorum jura ipsa per se firma esse oportere, non ex alieno arbitrio pendere².”

The apparent contradiction is explained thus. By papal indulgences many bishops had the privilege, when a priest died in their dioceses without making a will, of deciding what should be done with his property. This was called the *jus spoli*³. The question arose, if a priest did not make a will in the Roman sense but appointed a *salmann* (generally called in such cases *manufidelis*, or *treuhand*) leaving the disposition of his property to the *salmann's* discretion, is he to be considered to have died intestate or not? On the answer depended the bishop's right to exercise the *jus spoli*. The text of Canon Law in question is part of a letter from Innocent III to the Bishop of Auxerre, who had the *jus spoli* and who had asked the Pope, “an illi, qui in dispositione et voluntate alterius suam committunt ultimam voluntatem nil per se penitus ordinantes, nec determinantes, quid, cui loco vel personae conferri debeat, dicantur decedere intestati?” Innocent answered that such persons were not to be considered as dying intestate and therefore the *jus spoli* must not be exercised over their property, but he did not intend to alter in any way the Roman principle that a testator must himself determine the disposition of his property and not leave it to the discretion of another. What he had in

¹ c. 13. x. 3. 26.

² D. 28. 5. 32. pr.

³ As to this ‘Spolienrecht’ see Schröder 404.

view was a restriction of the *jus spoli*, not a relaxation of testamentary rules¹.

The Vergabung to the *salmann* was made in the usual way i.e. by *traditio* in court. The beneficiary could enforce his rights against the *salmann* by proof of the instructions given to the latter by the donor, either by means of documents or by witnesses².

The legal relation in which the *salmann* stood to the donor and to the donee was extinguished by the execution of his mandate or by its revocation by the donor during his life. The right to revoke the mandate did not of course descend to the donor's heirs, since that would have defeated the object of the whole transaction³. On the other hand the office of the *salmann* was hereditary and if he died without executing his trust the obligation devolved on his heir. If the heir was a minor his guardian could act for him in the matter⁴.

Before we pass to the introduction of testaments into use among the German laity a few words must be said on a kind of disposition *propter mortem* which was already in use and materially facilitated the recognition of the last will.

A mere request by a man on his deathbed that his relatives would distribute his property among pious objects for the good of his soul did not originally create any legal obligation⁵. But such requests (*Seelgeräte*) were not only favoured by the Church but also by the religious convictions of the people, and at a later period were made legally obligatory if they could be proved, and slight proof was sufficient⁶.

¹ Vangerow, Pandekten II 96 ff.; Mühlenbruch in Glück's Pandekten XLIII 403; Kreutzer, de exec. test. 36.

² So Stobbe loc. cit. 426; Beseler op. cit. I 282 is more doubtful.

³ Beseler op. cit. I 282.

⁴ Stobbe loc. cit. 427. Cf. Schultze 133 ff.

⁵ e.g. "Rupertus cum infirmitate atque languore gravi usque ad mortem se detineri persensisset, vocavit ad se filios suos, et fratrem Willihardum, caeterosque cognatos et amicos et...

rogavit eos obnixius, atque diligentius, ut partem praediorum suorum...ad altare S. B....delegarent, atque contraderent...pro aeterna animae illius requie. Illi autem haec audientes, fecerunt sicut erant docti." Schannat, Corpus Traditionum Fuldensium no. 641.

⁶ Heusler II 644 "Nicht nur die Kirche, auch die religiöse Anschauung und Ueberzeugung des Volkes forderten die Respectierung solcher letzten Willen Verstorbenen, und so wurden sie vom

Testaments had long been in use among the secular clergy¹, a usage borrowed from Roman law, though in form these clerical wills followed German rather than Roman models². They appear to have taken, roughly speaking, the form of a written Vergabung without the ceremony in court. Very frequently a *salmann* was appointed.

The latter part of the twelfth century is usually assigned as the period when laymen in Germany began to make testaments. Clerical influence and the revived study of Roman law no doubt had a good deal to do with the growth of the practice³. But the wills which now began to make their appearance were not Roman either in form or in substance. They were rather a development of the Vergabung von Todes wegen⁴. The motive may have come from outside, the material was native. All that was necessary for the conversion of the Vergabung von Todes wegen in which a *salmann* was interposed into a true testament was the disuse of the public ceremonies in court. Accordingly we find these formalities dropping off gradually and being replaced by a written document. First, the appearance of the donee before the court fell into disuse, then by gradual stages that of the donor. Finally, after an intermediate stage in which a written will was brought to the judges or the council for approval, all that was needed was the formal presentation of a closed and therefore secret written will to the court⁵.

Not only was the Roman form not adopted in the German will but also the latter differed from the Roman will in substance. In particular it contained no institution of an heir.

Rechte gleich den gerichtlichen Vergabungen anerkannt und geschützt und vielfach hinsichtlich des Beweises begünstigt."

¹ Heusler II 646. Schröder 701 says they were in use among the German clergy throughout the Middle Ages. A constitution of Frederick I in imitation of one of Constantine protected these clerical wills — "Habeat unusquisque licentiam decedens bonorum quod optaverit relin-

quere, et non sint cassa judicia." A.D. 1165. Pertz, Legum II 138.

² Heusler loc. cit.; Schröder loc. cit.

³ Beseler in Zeitschrift für deutsches R. IX 144.

⁴ Heusler II 650; Schröder 701.

⁵ Heusler II 650—1 traces the development in greater detail. This summary is of course a generalisation of what happened. All these stages are not necessarily found everywhere.

It was a mere catalogue of legacies. Under these circumstances the need was felt of some method of ensuring the execution of the terms of the will. Or rather, it would be more accurate to say the need would have been felt had not such a means been ready to hand. The *salmann* had already proved his usefulness in connection with the Vergabung von Todes wegen and when the Vergabung developed into a testament his sphere of activity was only extended. It became the practice to appoint a *salmann* to execute a will, just as it had been the practice to appoint a *salmann* to execute a Vergabung von Todes wegen.

A change soon came about in the method of appointing the *salmann* who was to execute a will, which brought the institution more closely into accordance with the true spirit of a testament. At first the *salmann*, or "testamentary executor" as we may now call him, was appointed in the old way—a bilateral act in which both the testator and the executor took part was necessary. It became the general practice at a later time however to appoint the executor in a clause of the will itself, possibly without his own knowledge till the will was opened after the testator's death¹.

The influence of the Church was all in favour of the development and spread of the institution, for it was greatly to the Church's interest that wills should be faithfully executed, since they always contained pious bequests and frequently nothing else. Several texts of the Canon Law enforced the performance of the executor's duties. One in particular had great influence on the development of the institution in France and at a later period in Germany, as will be seen in later chapters of this essay. It is this—

"Joannes clericus et P. laicus, exsecutores ultimae voluntatis O. clerici S. Crucis, qui venerabilibus et piis locis de bonis suis in ultima voluntate legavit, mandans insuper satisfieri creditoribus per eosdem post mandatum susceptum per dioe-

¹ Heusler II 653. An intermediate stage sometimes occurred in which the will was drawn up by a notary

and then handed by him to the executor.

cesanum, cogi debent testatoris explere ultimam voluntatem¹." (A.D. 1235.)

According to Kreutzer it is in chapters 17 and 19 of the title 'de testamentis' of the Decretals that the term *executor testamenti* first occurs. This is of course not accurate for the name occurs in our English Glanville some time before². But it was long before one name only was applied to the executor of a will. Down to the end of the Middle Ages he is met with especially in Germany and Italy under a variety of names³. Some of these such as *manufidelis*, *treuhand*, *salmann* carry with them a trace of the origin of the institution. Others were borrowed from Roman sources, such as *testamentarius*, *provisor*, *procurator*, *fideicommissarius*⁴. In England and France however the names 'executor,' 'exécuteur testamentaire' seem to have been far the most commonly used from the first.

Here then we have the true origin of the testamentary executor. He is nothing else than a *salmann* appointed to ensure the execution of a will which contained nothing corresponding to the Roman instituted heir⁵.

Although the origin of the executor can be most clearly seen in German legal history and in German documents, he

¹ c. 19. x. 3. 26. Other passages dealing with executors are c. 17. x. 3. 26; c. 2 vi to 3. 11; Clem. un. 3. 6.

² See post p. 38.

³ Lyndwood remarks on this variety, Provinciale p. 168.

⁴ Schultze, 18, quotes eleventh century documents from the Regesto di Farfa in which the executors are called *fideicommissarii et testamentarii*. In 1496 a testator "constituit" certain persons "suos executores, manufideles, fideicommissarios et dispositores... ipsos in rem suam constituendo procuratores irrevocabiles, ita quod post mortem suam bona praedicta apprehendere, habere, tenere... valeant," quoted by Kraut, Grundriss zu Vorlesungen über das deutsche Privatrecht, sixth edition, p. 377.

⁵ The following authorities support this view of the origin of the executor —Beseler, Erbverträge I 284; Walter, Deutsche Rechtsgeschichte, 637; Zoepfl op. cit. II 377; Mühlenbruch loc. cit. p. 402; Scholz, Ueber Testamentsvollziehern p. 16 ff.; Stobbe loc. cit. p. 421; Glasson, Histoire du droit et des institutions de la France VII 552; Le Fort, Exécuteurs Testamentaires p. 13; Schröder op. cit. p. 701; Heusler op. cit. II 652; Brunner in Holtzendorff's Encyclopädie der Rechtswissenschaft p. 288; Palumbo op. cit. p. 377; Pertile, Storia del diritto italiano IV p. 31; O. W. Holmes in Law Quarterly Rev. I 164, and in Harvard Law Rev. XII p. 446; Pollock and Maitland, History of English Law, first edition, II p. 334 n. 1.

appears in both England and France but little later than in Germany. In these different countries his fortunes were varied and will be most conveniently treated in separate chapters on each.

At the conclusion of this essay an attempt will be made to gather up and compare the results reached, and the process will be rendered none the less interesting by the reflection that they are the outcome of the development in different environments of institutions identical in their origin.

CHAPTER III.

THE TESTAMENTARY EXECUTOR IN ENGLAND¹.

WE need not here discuss the time and manner of the introduction of the testament into this country. We are concerned with the history of the executor and our task begins only towards the end of the twelfth century when he first made his appearance. Yet we may possibly derive some little instruction from applying to the earlier history the results arrived at for the Germanic law of which our own is the offspring.

The written *cwiðe* or *quide*, which, whether or not it was a true last will, was at any rate the nearest Anglo-Saxon approach to a testament, has been analysed into two elements, the post-obit gift and the "last words" or death-bed distribution of a man's goods². The post-obit gift we may with little hesitation identify with one form of the Germanic *Ver-gabung von Todes wegen*³, though its juristic nature may have been even less clearly apprehended by the men who used it than was that of its continental model. The second element in the *cwiðe* reminds us at once of those death-bed gifts for the repose of the dying man's soul (*Seelgeräte*) which in the

¹ It is not proposed in this chapter to follow the history of the executor in England beyond the point at which he may be said to have finally taken the position of personal representative of the testator to the exclusion of the heir. The matter thus included seems to be all that is necessary to point the contrast between the English and the

continental history, while to go further would be to attempt to condense the whole law of executors, a task impossible of accomplishment within the limits of an essay.

² Pollock and Maitland, *Hist. of Eng. L.* II 316.

³ Above p. 20.

German law grew up into a distinct legal institution and have their own place in the history of the German testament¹.

Nothing is found in the specimens of the *cwiðe* preserved for us that we can call the appointment of an executor. The appeals to the king to allow the *cwiðe* to 'stand²,' the invocations of the divine wrath on all who shall 'break' it³, testify to nothing but the absence of any such functionary. But in one or two cases we do get in the *cwiðe* something which, when we compare it with what we have learnt of the continent, may appear to be the germ of the English executor. A man says in his *cwiðe* :

"And be Bishop Aelfric and Tofi the Proud and Thrunni guardians (*mundes*) of this guide⁴."

Remembering the close connection between the *Salmann* and the *Vormund* it is impossible to read of these "*mundes*" of the *cwiðe* without thinking of the *salmann* of a *Vergabung* von Todes wegen, though we must not yet think of a *salmann* transplanted full grown to our shores.

We reach no firm ground in the history of the executor in England till the latter half of the twelfth century. Then we begin to find wills with executors and in Glanville we have a good deal of information on the subject. We must remark at the outset that the English will like the German will contains no institution of an heir. The heir with whom we shall have to deal is no testamentary heir. He is the heir provided by God, not man⁵.

Whence the executor comes is a question to which but one answer can be given when we bear in mind the evidence for his Germanic origin which has been collected by German investigators⁶. How he comes is another and a more difficult

¹ Above p. 30.

² e.g. Thorpe, *Diplomatarium Anglicum* p. 528 "I Wulfwaru pray my dear lord King Aethelred in charity that I may be worthy of my testament."

³ Thorpe *op. cit.* *passim*.

⁴ A.D. 1037. Thorpe, *op. cit.* p. 566.

See also *ibid.* p. 517.

⁵ Glanville vii 1 "solus Deus heredem facere potest, non homo."

⁶ See last chap. Chief Justice O. W. Holmes says in L. Q. R. i 164 "There can be no doubt of the identity of the continental executor and the officer of the same name described by Glanville."

question. No doubt ecclesiastical influence had much to do with it. The clergy had for some time been acquainted with the virtues of the *salmann* and the close intercourse which was now kept up between England and the continent under the Angevin kings with their wide continental dominions would afford every opportunity of introducing the new institution to a people already, perhaps, prepared for it by their knowledge of the *mund* of the cwiðe.

However that may be we must take it that by about 1180 A.D. England knew the testament and its executor and for our earliest definite information as to his rights and duties we must go to the pages of Glanville.

Glanville's first words when he comes to the law of wills give us at once the standpoint from which he regards the subject:

“Tenentur quoque heredes testamenta patrum suorum et aliorum antecessorum suorum servare, illorum scilicet cujus sunt heredes, et eorum debita acquietare¹.”

It is the heir on whom rests primarily the obligation of carrying out the directions contained in the will of the ancestor and of paying his debts. The executor as yet occupies but a minor position in the scheme of succession.

Having laid down this main proposition Glanville proceeds to give a sketch of the law of testamentary succession. Whatever may be the case in other parts of the world there is no person to whom a man is bound by the laws of this kingdom to leave anything except of his own free will. But this freedom of testamentary disposition applies only to that portion of his property of which the law allows him to make a will, and whatever may have been the case in earlier times the strict rule of the common law already prevents him from making a will of his lands, for they form the *hereditas* which descends to the heir. Even of his chattels he can dispose only of a third by his will for the other two thirds go to his heir and his widow respectively².

¹ Glanville vii 5.

² *ibid.* vii 5.

The forms to be observed in making a will are simple. There must be present two or more witnesses, lawful men and such as are in the legal sense 'fit,' whether they be clerks or laymen. The executors of the will, we are told, should be those whom the testator has chosen for the purpose and to whom he has committed the charge. If he names no executors his relatives and kinsmen can undertake the office¹.

If the executors find any one, even the heir, detaining the goods of the dead man, they can get a writ from the king directed to the sheriff in these words:

"Rex vicecomiti salutem. Praecipio tibi quod juste et sine dilatione facias stare rationabilem divisam N. sicut rationabiliter monstrari potuerit quod eam fecerit et quod ipsa stare debeat²."

Glanville has no more to say of the executor than this. The writ was the executor's instrument for performing the duties of his office and its terms show us what those duties were at the end of the twelfth century. The executor must 'cause to stand the reasonable devise' of his testator, that is, he must see that the legatees get their legacies, if the heir is dilatory. He has nothing to do with paying the testator's debts—that is the duty of the heir, to whom the law secures one-third of the chattels for the purpose.

Simple as the executor's functions are, difficulties may arise in his exercise of them. The writ says that the sheriff is to cause to stand the testator's *reasonable* devise reasonably made. What if a man, for instance the heir, is summoned by the sheriff to give up some of the dead man's goods and refuses on the ground that the will is not a reasonable will or that the thing demanded from him was not in fact bequeathed as the executor says it was? How are these questions to be settled? Glanville's answer brings us to one of the cardinal features of English testamentary law. Such questions, he says, are to be tried and settled in the Court Christian "*quia placitum de testamentis coram Iudice Ecclesiastico fieri debet et per illorum qui testamento interfuerint testimonia, secundum iuris*

¹ Glanville vii 6.

² *ibid.* vii. 7.

ordinem terminari¹." The testamentary jurisdiction of the ecclesiastical courts will be discussed later; here it is sufficient to notice that in Glanville's time it was already part of the "course of law" that those courts should hear and determine questions of the validity and interpretation of wills. Not that the spiritual courts had as yet obtained that complete and exclusive jurisdiction in testamentary matters that they were soon to claim, and successfully claim, as their own. The enforcement of the terms of a will is still at this time the affair of the secular authority as the existence of the writ quoted above shows. The Church decides disputes as to the validity and meaning of the will—the civil power gives effect to rights acquired under the terms of the will so tested and interpreted.

If a man who proposes to make a will is burdened with debts the heir may compel him to make provision for paying the creditors before distributing his third portion in legacies. If after the testator's death it is found that his chattels are not sufficient to pay the debts then the heir must make up the deficiency². Glanville does not say who could sue to recover debts due to the deceased but we can have no doubt that the heir only and not the executor could do so.

Bracton, our next great authority after Glanville, gives the same rules as Glanville, but in greater detail, as to the proportion of his goods of which a man may make a will, but when he comes to discuss the liability of the heir to discharge the debts of his ancestor we remark an advance on the law of Glanville's time in the direction of a further alleviation of the heir's position. The heir is still bound to pay his ancestor's debts but now only to the extent of the chattels that come to his hands, although if he acquires property from other sources Bracton accounts it a moral duty to pay the excess³.

Bracton as we might expect is much fuller than Glanville on the boundaries of the royal and ecclesiastical jurisdictions. If there is a dispute about a man's will, he tells us, it must be settled in the ecclesiastical court "because the King's Court

¹ Glanville vii 8.

² *ibid.* vii 8.

³ Bracton f. 61.

does not meddle with testamentary or matrimonial causes¹." Testamentary causes now include not only questions relating to the validity and interpretation of the will but others also which are accessory to or connected with the will, as for example when a legatee sues for his legacy, and no writ of prohibition will be issued against an ecclesiastical judge entertaining such a suit².

The ecclesiastical jurisdiction is wider than it was in Glanville's time and so is the sphere of action of the executor—two closely connected facts, for at this period the executor's dealings were almost entirely with the ecclesiastical, very little with the royal courts. Thus the executor can now sue in the Court Christian on debts which had been proved (*convicta*) or acknowledged by way of recognizance (*recognita*) during the testator's life-time, for such debts are "quasi in bonis testatoris." On the other hand for debts not so acknowledged or proved only the heir can sue and he must sue in the civil courts. If the executor or the heir brings an action on such unacknowledged debts in the Court Christian the debtor can get a writ of prohibition. Similarly creditors of the deceased must sue the heir and not the executor and must bring their actions in the King's Courts³.

So far as Bracton's treatise "*De Legibus et Consuetudinibus Angliae*" goes, the executor has still very little to do with the testator's debtors and creditors. Some of the cases reported in Bracton's Note-Book however seem to carry the matter a little further. Gilbert Earl of Clare was sued for one hundred marks under a deed of his father's. He acknowledged the deed but pleaded that the father could not bind his heir. When

¹ Bracton f. 61.

² *ibid.* f. 407*b*.

³ Bracton f. 407*b*. "*Si autem petatur debitum per executores de quo debitores in vita testatoris confessi non fuerint nec convicti, vel nec post mortem gratis recognoverint, hujusmodi debitum inter bona testatoris non connumeratur, et si ab executoribus vel ab haerede in foro ecclesi-*

astico petantur, locum habebit prohibitio, et in foro saeculari oportebit agere, hujusmodi enim actiones haereditariae sunt et pertinent ad haeredes, et ideo legari non possunt, et sicut dantur haeredibus contra debitores et non executoribus, ita dantur actiones creditoribus contra haeredes et non contra executores."

this plea failed he pleaded that his father had left executors and that he, Gilbert, did not know whether the debt in dispute was mentioned in the will or not, nor whether his father owed anything or not, and begged for time to make inquiries into the matter. His prayer was granted¹. As Professor Maitland remarks this may show that if the debt had been mentioned in the will the executors would have been liable to pay it, and this possibility is strengthened by the consideration of another case given by Bracton. Ralph, parson of Irtlinburgh, sued the executors of Robert de Burgh in the Court Christian for a debt of ten pounds owed him by the testator. The executors got a writ of prohibition and Ralph was now attached to answer for disregarding it. His defence was that he had impleaded the executors because Robert had in his will enjoined them to pay the debt. The executors replied that Robert had never so enjoined them nor was any mention made of the debt in his will, in proof of which statements they exhibited the will, "*et petunt super hoc iudicium. Et ideo consideratum est quod ipsi Johannes et alii inde quieti et Radulphus in misericordia et prohibitum ei est ne de cetero sequatur*"². Another case³ gives us an example of this kind of special mention of a debt in a will, in this instance a debt owing to the testator, thus giving us the active side of representation. The testatrix appointed her husband and others executors, "*et ad execucionem illam faciendam et ad debita perquirenda et specialiter ad debitum istud perquirendum et ut inde disponerent sicut de aliis secundum quod viderent expedire*"⁴. The husband as executor sued for the debt in the Court Christian and the debtor sought a writ of prohibition on two grounds, first, that the debt had been owing thirty years during the life of the testatrix, and secondly, that she could not bequeath it because it had not

¹ Bracton's Note-Book, ed. Maitland, case no. 52.

² Case no. 162.

³ no. 550.

⁴ Such special directions to the executors to get in the debts owing to the testator remained in use after they had become unnecessary through the

substitution of the executor for the heir as the personal representative of the testator; see Hingston-Randolph's Registers of Diocese of the Exeter-Bishop Bytton p. 433 (A.D. 1295); "Wills from Doctors' Commons" (Camden Society) p. 1 (A.D. 1495).

been acknowledged by recognizance during her life nor had she sued for it. No objection was taken to the executor suing for the debt. Judgment went against him, according to Bracton, partly on the first ground, namely the long lapse of time, partly on the special ground that even if the testatrix had sued in her life-time she could have sued only in the King's Court, not in the Court Christian. Nothing is said of the second plea of the defendants, so it would appear that it was not upheld by the Court. It is true that this case is cited by Bracton in the "*De Legibus*¹" to prove "*quod actiones legari non possunt, nec inter bona testatoris connumerantur, maxime de antiquo debito,*" but his own report of the case in the Note-Book does not support his proposition. Bracton also cites one of the cases previously mentioned, that of Ralph of Irtlinburgh, in support of practically the same proposition, namely, "*quod actiones legari non possunt, nec iudices ecclesiastici inde recognoscere, nec executores petere debitum quod in vita testatoris non est recognitum.*" This citation is even more unhappy than the former one, as a reference to the case will show. The question there at issue was not whether executors could or could not sue on the unacknowledged debts of their testator but whether the testator had specially instructed his executors to pay the debt he owed Ralph. As they were able by producing the will to show that he had laid no such injunction upon them the question whether an injunction of the kind rendered the executors liable for the debt did not need to be decided. Bracton in fact supports a sound general statement by reference to cases which, if they are of any value at all with reference to the matter in hand, go to show the validity of a small class of exceptions to his general rule. It is the more curious that Bracton should have done this as he had cases exactly in point ready to hand in his Note-Book. One of these we must do him the justice to say he does quote, the case of Engelard de Cigogné². That was the case of a legatee who sued a debtor of the testator and lost her suit because the debt had not been acknowledged in the testator's life-time. Again

¹ f. 407b.² no. 684.

in case no. 810 we find executors losing an action against a debtor of their testator for the same reason¹.

On the whole it seems reasonable to conclude that the Courts were already beginning to allow, in cases where there was a special provision in the will, an exception to the rule that the heir and not the executor must pay the testator's debts and get in the moneys owing to him, and that Bracton, intent on the development and substantiation of his main proposition, overlooks the recently admitted exception. It was the executor's first important step to the position of personal representative of his testator.

To the legatees the executor stands in closer and more constant relations in Bracton than in Glanville. In the earlier period the execution of the will was primarily the duty of the heir, the executor only exercising his functions if the heir failed in that duty. For the law of Bracton's time on this point we must rely mainly on the cases in the Note-Book as there is little or nothing directly touching it in the "*De Legibus*." That it was the executor's duty to pay the legacies is shown by case no. 381, where a legatee attempted to sue a debtor of his testator in the King's Court. Defendant pleaded that the suit being testamentary should be in the ecclesiastical forum, and also that he had satisfied the executors for all debts he ever owed the testator as he could prove from a writing of the executors. It was ordered that the legatee should pursue her action in the Court Christian against the executors.

The case mentioned above² of a legatee suing a debtor of the testator and losing his action because the debt had not been acknowledged in the testator's life-time was apparently a case of a special bequest of a particular debt.

Again in case no. 756 a legatee sues the executors for his legacy thirty-three years after the testator's death. In their defence the executors relied mainly on the long interval of time that had elapsed, but partly also on this, that one of the executors, the granddaughter of the testator, said she was not his heiress and had not benefited under the will, and on these

¹ "*Sed heredes ipsius (testatoris) si viderint expdire.*"
perquirant sibi versus ipsum Petrum ² no. 684.

grounds the executors won their case. The latter of the two pleas weakens the case somewhat as an authority for the statement that it was at this period the executor's duty to pay the legacies (not merely to see that the heir paid them) and not the heir's, but the fact that others were sued with her as executors and took no exception to it together with the judgment in case no. 381 seems to make it clear that such was the law¹.

Before we enter on the important period of legal development which begins with the reign of Edward I, it may be well to summarize the position the testamentary executor had now reached, so far as it has been here considered². It was the executor's duty to take possession of that portion of the testator's goods and chattels of which he had the power of disposing by will, and to distribute it to the legatees in accordance with the instructions contained in the will. If the deceased had during his life obtained from his debtors an acknowledgment of their debts by way of recognizance or from the court a judgment against them, such debts were reckoned among the testator's chattels and descended to the executor, who might sue for them in the ecclesiastical court. All debts which were unacknowledged or on which no judgment had been obtained, on the other hand, descended to the heir who alone could sue for them, the proper forum being in his case the King's Court, unless the testator had in his will expressed his wish that the executor should sue for them. If this were the case the executor could exercise the right thus specially conferred upon him in the Court Christian. So much for the 'active' side of representation. On the 'passive' side, similarly, the heir was liable, generally speaking, for his ancestor's debts; the executor was liable only if a special clause in the will instructed him to pay the debts.

So far it is evident that if we are to speak at all of a "personal representative" of the dead man we must apply the

¹ See also Magna Carta s. 26.

² His duties in regard to proving the will, obtaining a grant of administration and so forth, will be treated

later in connection with the testamentary jurisdiction of the ecclesiastical courts, below p. 68.

phrase not to the executor but to the heir. Strictly speaking neither the heir nor the executor is at this period entitled to the designation, the heir because the whole of the personal property does not descend to him but only a third part, the executor because he does not represent the deceased so far as debtors and creditors are concerned. The interest of the succeeding period in the history of the testamentary executor lies in the gradual addition to his old functions of those which were still needed to make him, practically¹ speaking, a true "personal representative" of his testator.

The Executor in the King's Court. The great change which occurred in the position of the testamentary executor towards the end of the thirteenth century is nowhere explicitly mentioned and explained in contemporary documents. One of the earliest traces of it is to be found in the book known as *Fleta*, whose date is about 1290. After epitomising Bracton's account of the relations between the debtor of the deceased and the latter's heir and executor the author of *Fleta* adds in one of the few original passages of the book "permissum est tamen quod executores agunt ad solutionem in foro saeculari aliquando²." The novelty of this lies in the statement that executors were sometimes allowed to sue debtors of their testator in the civil courts—we have seen that for some time past they had been suing in special cases in the ecclesiastical courts. Why did the King's Courts now begin to allow executors to sue the debtors? The answer to this question is probably to be found in an attempt of the Church Courts to extend their jurisdiction by permitting executors to sue their testator's debtors not only as before where a special clause in the will directed them to do so, but generally, with or without such special clause.

At a date uncertain but in all probability between A.D. 1279 and 1285 some *Articuli Cleri* were presented to the king in Parliament³. Among other things the clergy complained—

"Art. III. Item cum executores alicujus testamenti agant

¹ Never strictly until 1897—see below p. 63.

² *Fleta* c. 57.

³ Raine, *Historical Papers and Letters from the Northern Register*, vol. 61 of *Rolls Series* p. 70.

contra testamenti debitores, ut ex eorum debitis compleant voluntatem ipsius, etiam si fideicommissa respiciant vel legata, proponitur prohibitio contra eos."

To this article no final answer was given but it was pointed out that the executor ought to be in no better position as against the debtors than the testator himself would have been, and it was hinted that the procedure of the Church Courts in matters of proof was not calculated to further that desirable object.

Again a synod of bishop Peter Wyvill of Exeter in 1287 put forth certain canons with a view to instruct the laity in testamentary law¹, and to provide for its enforcement. Among other things it was laid down as follows—

"Excommunicamus omnes executores quovis modo impedimentum praestantes, vel aliter recusantes in foro ecclesiastico a defuncti creditoribus conveniri, vel ipsis, sicut decet, inibi respondere.

"Item omnes illos qui, scientes se obligatos defuncto, patiuntur se per malitiam a suis executoribus conveniri, ut sic ipsis in probatione deficientibus, per sententiam absolvantur vel impediant quoquo modo, quo minus in foro ecclesiastico ab executoribus defuncti libere valeant conveniri²."

All this shows that the ecclesiastical courts were anxious to entertain suits between executors and debtors and executors and creditors and that they meet with opposition not only from the King's Courts but from the parties concerned. And when we find a year or two later Fleta saying that sometimes executors can sue the debtors in the civil courts, and many examples of such actions reported in the earliest of the Year Books, it seems more than probable that the two things ought to be connected as cause and effect. At the time when the King's Courts were tacitly acquiescing in the consolidation of the ecclesiastical jurisdiction in testamentary matters, the personal representative of the testator was the heir, not the

¹ "Propter simplices qui neutrius-
que juris (i.e. neither of canon nor civil
law) girarunt volumina, nec ipsorum

habent notitiam." Wilkins, Concilia
ii 155.

² *ibid.*

executor, and actions in which the debtors and creditors of the dead man were concerned belonged in nearly all cases to the secular forum. The royal judges would naturally resent and take steps to counteract an attempt of the ecclesiastical lawyers to push back the boundary that had been assigned to them and one way of doing that would be to cut the ground from under their rivals' feet by allowing executors similar privileges in their own courts¹.

However that may be, a glance at the Year Books shows on what foundation the statement of Fleta rests. In the twenty-first year of Edward I there is a case in which *A* in the character of executor brings an action of Debt against *B* the debtor of his testator. *B* does not attempt to deny *A*'s right to sue him if he really is the executor. "Make yourself out to be executor" is all he demands. This the plaintiff succeeds in doing and so wins his case². This is but the first of a long stream of cases running through the Year Books in which executors bring an action of Debt against the debtors of their testators. The heir was not yet ousted from his old privilege of suing such debtors³, but the action of the King's Courts has now placed the executor on an equality with him in this respect.

The first case in which a creditor sues the executor (apart from those previously mentioned in which the will directs the executor to pay the debt) seems to be in 30 Edward I⁴ but that the practice was of earlier date is shown by two notes in 22 Edward I. One of these runs thus—

"Note that, in a writ of Debt brought against one on the deed of another, as for instance against the heir in respect of the deed and debt of his father, or against the executor in respect of his testator, there ought to be inserted, not the 'debet' but only the 'injuste detinet'⁵."

The second of the two notes shows that the creditor could

¹ Pollock and Maitland II 345.

² 21 Edw. I p. 375 Rolls edition, to which references are given throughout this chapter for such years as that

edition includes.

³ 22 Edw. I 515 Rolls edition.

⁴ 30 Edw. I 239.

⁵ 22 Edw. I 614.

bring an action of Debt against executors on other *causae debendi* than the deed of the testator.

“Note that if one demand a debt against executors by a tally or by suit, in this case, because the executors cannot make the law for the dead man, then the plaintiff must prove his tally; or if he have suit, the suit ought to be examined; and this holds good whether he be a merchant or not; otherwise it follows that he will lose his debt¹.”

If the creditor had a deed to show for his debt he need not have recourse to the methods of tally or suit to prove his claim. The passage therefore can only have reference to cases in which there was no deed i.e. to cases of simple contract, as indeed is shown by the reference to wager of law. A man could not wage his law against a deed or against a record, but he could against a tally². Here then we have evidence of creditors being allowed to sue executors without showing a specialty or record in the reign of Edward I. Again in the thirtieth year of the same reign we have a plaintiff suing the executors of his lessee for years in Debt to recover four pounds due under the lease, but there is no mention of a deed³ and we know that wager of law was permitted in an action of Debt for rent where there was no deed⁴.

But under Edward III we find a much stricter rule being enforced. In the twenty-fourth and forty-first years of that reign it is laid down that executors are not liable on the simple contracts of their testator, but only on his specialties⁵, and this remained the rule. The reason given for the rule was that the executor ought not to be held liable where he was unable to use the means of defence open to the testator, i.e. the wager of law.

¹ 22 Edw. I 456.

² Pollock and Maitland II 213. Mr Jenks, *Doctrine of Consideration* p. 170 says “this line of defence could not be adopted where the plaintiff shewed record, specialty or tally.” This seems a hasty generalisation from the privileges allowed to Merchants—20 Edw. I 68 “Note, that by

Law Merchant one can not wage his law against a tally; but if he deny the tally, the plaintiff must prove the tally.” Pollock and Maitland loc. cit.

³ 30 Edw. I 238.

⁴ 20 Edw. I 304. Pollock and Maitland II 212 n. 3.

⁵ 24 Edw. III 40 pl. 22; 41 Edw. III 13 pl. 3.

Where there was a deed the testator himself could not have waged his law and therefore there was no hardship in holding the executor liable in an action of Debt. Similarly the action of Covenant lay against executors, for Covenant lay only on a promise under seal and therefore did not admit wager of law. And a contract of record being in the same case with regard to wager of law the executor was liable for the judgment debts of his testator¹. No doubt the judges in enforcing the stricter rule as to the executor's liability were of opinion that they had before gone too far in the opposite direction—it is quite certain that as wager of law went out of practical use the rule as to the executor's liability which was founded on it became a purely mischievous relic of antiquity. The difficulty was not got rid of till the sixteenth century and then only indirectly, by the introduction of the action of Assumpsit².

The action of Debt was given to executors by the common law, but not the action of Account³. This action was extended to executors by the Statute of Westminster II⁴, and as this statute was construed to apply to immediate executors only⁵, it was further extended to the executors of executors by 25 Edward III st. 5 c. 5 on the petition of the Commons⁶. The action of Account was not allowed against executors except in favour of the King⁷ till the statute 4 and 5 Anne c. 16 s. 28. The writ of Detinue, which was "merely a variation of the writ of Debt⁸," likewise lay for and against executors⁹.

The maxim of the common law as to actions on torts was *actio personalis moritur cum persona*, and so the executor could not sue or be sued on the wrongs committed against or by his

¹ 18 Edw. II 613.

² Below p. 58. Mr Jenks, *op. cit.* p. 171, notices the transition to the strict rule connected with the wager of law from the laxer state of things in Edward I's day but seems to put the introduction of the new rule too late, viz. in the fifteenth century. It can be traced to the reign of Edward III.

³ See Fitzherbert, *Natura Brevium* 117; 11 Coke's Reports 90a.

⁴ 13 Edw. I c. 23.

⁵ 7 Edw. III 62 pl. 54; 11 Edw. III 186.

⁶ Rolls of Parliament II 239.

⁷ 11 Co. Rep. 90a.

⁸ Pollock on Torts 325.

⁹ Detinue against executors 16 Edw. II 490; 12 Edw. III 373; 29 Edw. III 38; 14 Hen. IV 23 pl. 30; for executors 14 Edw. III 97. Maitland, Appendix to Pollock's Law of Torts p. 538.

testator. But an exception to the rule was introduced by the statute 4 Edward III c. 7 which permitted the executor to bring an action of Trespass for goods and chattels of his testator carried away during the latter's life-time. The same right of action was allowed to the executors of executors by 25 Edward III st. 5 c. 5. No exception to the rule seems to have been allowed on the passive side till the doctrine was introduced that the personal representatives of a deceased tortfeasor could be held liable so far as his wrong had actually enriched his estate¹. The semi-criminal character of the action of Trespass in early times had much to do with this long-continued unwillingness to allow it to be brought against any one but the actual wrong-doer².

In drawing up the writ in all cases where executors were concerned, whether as plaintiffs or defendants, many points had to be carefully attended to under penalty of failure. When more than one executor was named in the will all must as a rule be named in the writ, whether for or against the executors³; if one had refused to administer, yet he must be named, because he might still administer if he wished⁴. In 18 Edward II 613 when the will appointed six executors but the Ordinary had granted administration to three only it was held that these three could sue in Debt without the rest, because the latter would not be held to account by the Ordinary and an acquittance by them would be of no value.

But the rule did not apply in an action of Trespass brought by the executor for goods taken from his possession. In that case an executor who actually administered might sue without naming in the writ one who had refused⁵ because "*l'action est doné a luy de sa possession demesne.*"

Executors in bringing a writ of Debt must mention in the writ that they are executors, though the heir in a similar case

¹ Temp. Eliz. Sherrington's Case, Savile 40; Bowen L.J., in *Phillips v. Homfray* 24 Ch. D. 454.

² Bowen L.J., in *Finlay v. Chirney* 20 Q.B.D. 503; F. W. Maitland, Appendix to Pollock's Law of Torts p. 540.

³ 33 Edw. I 62; 15 Edw. III 344.

⁴ 4 Ed. III 43 pl. 19 as to *scire facias*; 41 Edw. III 22 pl. 10, 49 Edw. III 17 pl. 10, 35 Hen. VI 35 pl. 44, 3 Hen. VI 6 pl. 6 as to Debt. See also Monro's *Acta Cancellarie* p. 301.

⁵ 42 Edw. III 26 pl. 12.

need not mention that he is heir "for executors do not demand as in respect of what is due to them but of what was due to the testator; but the heir demands as in respect of what is due to himself and for his own profit¹." So, too, when they are defendants the writ must mention their character.

Executors in bringing an action, also, must prove their right to the title they assume, usually by producing the will proved before the Ordinary, or they would "take nothing" by their writ². For this purpose a will not proved in due form was of no use³. But in some cases weaker evidence was held to be sufficient. In 21 Edward I⁴ an executor in bringing an action of Debt was unable to show the will because it had been burnt but averred that he had administered the estate. Bereford J. said to the defendant "If you had demanded this debt against him as executor, although you had nothing to shew that he was executor, yet if you could aver that he had the administration of the goods of the dead man, he should answer you. And since he would answer you in the absence of a writing (shewing his office) for the same reason he shall be answered without a writing, where he is ready to aver that he is executor and administered as executor." When the executor was the defendant it was sufficient to show that he had administered, whether or not he was really executor. Thus in 13 Edward III an action of Debt was brought against Alice as executrix of one J. She denied being executrix, but could not deny that she had had administration. Schardelowe J. said "Even though she were not executrix, if she had administration, the writ would be maintained against her as against an executrix⁵." Again in 5 Edward IV it is said "in a case of Debt against executors it is not necessary for plaintiff who brings the action of Debt against them as executors to show how they are made executors, for they may be made executors in different ways, as by administration committed to them by

¹ 13 Edw. III 168; 21 Hen. VI 8 pl. 18. Hence also the difference that the heir's writ runs in the common form "*debet et injuste detinet*," the executor's "*injuste detinet*" only.

² 33 Edw. I 68.

³ 7 Hen. IV 18 pl. 19.

⁴ 21 Edw. I 374.

⁵ 13 Edw. III 148.

the will and proof of the latter, and also by their own tort, wherefore plaintiff is not bound to show how they are made executors...but it is sufficient for him to bring his action against those who have administered or who are in possession and occupy as executors, but if they bring an action as executors it will be otherwise, for then they must show how and in what manner they are made executors, and otherwise they cannot bring their action¹." The production of the will with the record of the probate under it was conclusive as to the executorship². Here we have the beginning of the rules as to the executor *de son tort*.

An executor sued by a creditor of his testator might plead 'plene administravit,' that is to say, that he had fully administered the estate and no longer held any of the assets, "rien entre mains." If he could prove his plea, showing that he had no assets on the day the writ was issued nor since, he would be successful³—if he could not show this the plaintiff would recover judgment, as a rule against the goods of testator as to the amount of the principal debt⁴ while as to damages and costs the judgment might be against the executor's own goods if the testator's were insufficient⁵. If however the conduct of the executor savoured of fraud, as for example if in such a case as that supposed judgment had been given for the plaintiff and then the executor sold the goods which he had been proved to have still *entre mains*, so that the sheriff to a writ of *feri facias* returned to the effect that though formerly the executor had assets *entre mains* yet before the writ came to him (the sheriff) he had sold them, then execution was granted against the executor's own property as to both the principal debt and damages⁶. The same result followed a sale of assets by the executor before judgment but after the issue of the original writ⁷. If the executor pleaded "not executor and never ad-

¹ 5 Edw. IV 72.

² 4 Hen. VII 13 pl. 12.

³ 10 Hen. VI 22 pl. 74.

⁴ 11 Hen. IV 5 pl. 11.

⁵ 17 Edw. III 66 pl. 83; 21 Hen. VI 40 pl. 10.

⁶ 11 Hen. IV 70 pl. 3.

⁷ 12 Edw. III 398; 9 Hen. VI 57 pl. 2. In 20 Hen. VII 2 pl. 5 and 4 pl. 12 is a case where executors pleaded to a writ of Debt "rien entre mains"—plaintiff showed that they

ministered as executor" and this was found against him judgment would likewise be against his own chattels, no doubt because of the element of fraud in his false plea¹.

Much learning on this question of the personal liability of executors is to be found in a case argued at great length in the Michaelmas, Hilary and Easter Terms of 11 Henry VI and again in 20 Henry VI². James Andrew brought a writ of Debt against Benet Harlwyn. He counted how formerly he brought a writ of Debt against Harlwyn and others as executors—they claimed judgment on the writ because it did not mention one A. to whom also administration had been committed by the Ordinary and who was still living. Plaintiff contended that A. had never administered and on this issue being found for him he recovered judgment against the goods of the deceased and then sued out a writ of *feri facias* to have execution. To this writ the sheriff returned that Harlwyn had none of the testator's goods. Andrew said that, in fact, since the judgment and suing of execution Harlwyn had sold chattels of deceased (this he proved) and converted the money to his own uses. He now brought an action of Debt against Harlwyn to recover the amount of the judgment debt and the writ ran *debet et detinet*. It was argued for the defendant first "that this writ must be abated: for defendant is only chargeable as executor and not as on his own contract, therefore the writ should be *detinet* only and not *debet et detinet* for if he had had execution of the judgment by *fi. fa.* the writ would only be against the chattels of the deceased since the original writ ran only against them³. And as this action is founded on the record and he declares on that it seems it will only be *detinet* since this action takes the place of a writ of execution." To this it was answered that although an executor will only be charged on the chattels of the testator so long as he acts "as an executor should" yet "an executor may by his own act alter plaintiff's action and charge

had redeemed out of their own moneys a gold cup pledged by the testator. It was held that this was the property of the executors, not of the testator and therefore not assets *entre mains*.

¹ 11 Hen. IV 5 pl. 11.

² 11 Hen. VI 7 pl. 12, 16 pl. 9, 35 pl. 30; 20 Hen. VI 4 pl. 14.

³ This argument could not have been easy to maintain after the decision in 9 Hen. VI 57 pl. 2.

his own goods, as if he pleads that he was never executor and never administered as executor, or a false acquittance, which is found against him; in these cases he will be charged of his own goods for his false plea; so it will be here."

Secondly, it was argued for the defence that the writ was bad, because the original action was against two other executors besides the present defendants, and they might have chattels of the deceased which ought first to be proceeded against. The answer to this was, that it was "against reason" to charge them for the acts of another; it was the defendant alone and not the other executors who had sold the chattels and converted them to his own uses.

No decision is recorded in the case but the Chief Baron of the Exchequer, June, thought that the plaintiff ought not to have brought the action of Debt but should have sued out a new writ of *fieri facias* against the executor's own chattels; and a comparison of the case with the others already cited shows that this was probably the correct conclusion.

It might happen that where there were more executors than one and they were sued by a creditor they might enter different pleas in defence, and then judgment would be given in different forms against them if they lost the day. In an action of Debt against two executors on a deed of the testator one pleaded *plene administravit*, the other 'not the deed of his testator.' Judgment was that the first should pay damages from his own property if that of the testator were insufficient, while the second was held liable only to the extent of the assets *entre mains*¹. If one only of the executors appeared to the writ and he failed to make good his defence, judgment was given and execution issued against all the executors². But it was not so when executors were charged in Detinue on their own act, not the testator's, for then all must appear³.

As closely connected with the liability of executors we may here consider shortly the capacity in which at this period the executor held the assets. Chief Justice O. W. Holmes thinks that when the executor had partially displaced the heir, that

¹ 7 Edw. IV 8 pl. 18.

² 17 Edw. III 20 pl. 58 and 20 pl. 1.

³ 14 Hen. IV 23 pl. 30.

is at the beginning of the fourteenth century, this capacity, like that formerly of the heir, was that of absolute ownership. He relies on a case in the Rolls of Parliament¹ and one in the Year Books² in which, the executor being defeated in an action of Debt, judgment was given against him personally. In the first of these cases "the defendant complained of these judgments" (there were two writs against him by the same plaintiff) "in Parliament and assigned as error that there came to his hands only £27 at most and that the two judgments amounted to £40 and more." (He also complained that his co-executor had not been charged with him.) "If the defendant was right in his contention it would follow in our time that the judgment should be *de bonis testatoris*, yet it does not seem to have occurred to him to make that suggestion. He assumed as the court below assumed that the judgment was to go against him personally. The limitation for which he contended was in the amount of the judgment not in the fund against which it should be directed³." Yet, as we have seen above, in execution a distinct line was drawn between the two funds. And if the form of the judgment against the executor in the cases quoted shows "a trace of absolute ownership," it seems strange that the executor when he was suing had to make his writ run "in the detinet only," while the heir's ran "in the debet et detinet." We are explicitly told that the reason of this was that "executors do not demand as in respect of what is due to them, but of what was due to the testator; but the heir demands as in respect of what is due to himself and for his own profit⁴." Certainly the *salmann* from whom the executor's descent is traced was no absolute owner, nor was the feoffee to uses whom Chief Justice Holmes identifies with the executor⁵.

Enough has been said to show the very prominent part played by the testamentary executor in the King's Courts in relation to the debtors and creditors of the testator during the two centuries following the accession of Edward I. Before passing to consider the way in which during the following

¹ 1 107-8.

² 17 Ed. III 66 pl. 83.

³ O. W. Holmes in *Harvard Law*

Rev. ix 42 foll.

⁴ 13 Edw. III 168.

⁵ *Law Quarterly R.* i p. 166.

century the executor was made liable for the simple contracts of his testator we may inquire what, meanwhile, had become of the heir? What changes in his relations with the executor had followed this rapid development of the latter's activity?

Various cases in the Year Books, scanty in number when compared with those in which executors are concerned but yet of unmistakable import, show that down to the middle of the fourteenth century the heir had not yet been entirely expelled from his old position in the succession to the personal property of his ancestor¹. But the heir is now as subordinate to the executor as a century before the executor had been to the heir. In the time of Bracton it was the right and duty of the heir in general to pay the creditors and if necessary to sue the debtors of his ancestor; only in particular cases did the executor take his place². A century later the position is exactly reversed. It is now the executor in the ordinary case who represents the testator; the heir is concerned only with a particular class of debtors and creditors, those namely between whom and the testator there had passed a sealed writing. (We are now speaking of a period before the rule was laid down that the executor was liable only where the testator could not have waged his law.) On a deed of his ancestor the heir could bring an action of Debt³ but it was laid down in 14 Edward III that he could not sue even on his ancestor's deed if there were executors⁴. In the case referred to a man brought the action as his father's heir and produced an obligation made to his father and his father's heirs. The defendant produced an acquittance by the father's executors and this was held a good defence to the action, Schardelowe J. remarking "*this action is given naturally to executors and not to the heir, unless it be for default of executors; wherefore it seems that an executor can release this action*"⁵. It is to be

¹ 22 Edw. I 514; 13 Edw. III 168; 14 Edw. III 94; 21 Edw. III 9 pl. 28; 27 Edw. III 6 pl. 23 and 29. Rolls of Parliament 11 9b, 1 Edw. III, the Commons pray that debts due to the King shall be levied when the heir is

under age either of the executors or else of the heir when he comes of age, so that the guardian shall not lose.

² Above p. 40 ff. ³ 22 Edw. I 514.

⁴ 14 Edw. III 94.

⁵ The reporter has a note on this:

observed that the deed in this case purported to bind the debtor to the heir though not to the executor. Conversely the heir could be sued and could only be sued on a deed of his ancestor which was expressed to bind the heir, and it was a good defence to an action on such a deed to plead that the ancestor had left executors and the executors had still assets *entre mains*¹ although the deed made no mention of executors².

It seems therefore in accordance with the evidence to say that by the middle of the fourteenth century, that is about a century and a half before Assumpsit had introduced a new method of enforcing simple contracts generally, the executor had come to 'represent the person of the testator' in a more general sense than the testator's heir³.

We must now trace the process by which the executor was rendered liable on his testator's simple contracts. We have seen⁴ that from about the middle of the fourteenth century the creditor could sue the executor in Debt only on a deed, because in other cases the testator might have waged his law. So that a man who had entered into a simple contract lost the whole benefit of it if the other party died before carrying out his part⁵. For relief from this as from many other grievances we find application being made to the equitable jurisdiction of the Chancellor. Under Edward IV we find creditors of a Bishop of London praying that the Bishop's executors may be caused to appear in Chancery to answer for the debt for that they had refused to pay it "against all right and conscience;

"And note the opinion of the Court in this case was that while there is an executor living, who represents the estate of the testator, the heir shall not have an action." See also 9 Hen. VI 54 pl. 39.

¹ 27 Edw. III 6 pl. 23.

² See Co. Litt. 209a "the executor doth more actually represent the person of the testator, than the heir doth the person of the ancestor; for if a man bindeth himself, his executors are bound though they be not named, but so it is not of the heir."

³ See however Pollock and Maitland II 345—6.

⁴ Above p. 48.

⁵ Though in some cases he might apparently have a remedy in the Exchequer: "Nota, if a man is indebted to me upon a simple contract and dies, I have no remedy by the common law against the executors: but I shall have a Quo minus in the Exchequer, supposing I am indebted to the King." This we are told was common use. 11 Hen. VII 26 pl. 9. See also 27 Hen. VIII 23 pl. 21.

in which case they (the creditors) have no remedy by the course of the common law inasmuch there was never especialty thereof made¹."

But these appeals to equity became unnecessary when the common law Courts had found a remedy for the grievance, as happened during the sixteenth century. The action of Assumpsit as a remedy for non-feasance as well as for mere malfeasance of a simple contract dates from 1504². The defendant in Assumpsit could not wage his law, so that the old rule which had prevented an action of Debt being brought against an executor on his testator's simple contracts did not apply. But in spite of this, Assumpsit was not at first allowed to be brought against executors, for a reason connected with the peculiar origin of the action. Originally conceived of as an action to obtain a remedy for a tort, being in fact a form of the action of Trespass on the case, Assumpsit came in time to be regarded as an action *ex contractu*³. From the former point of view the man who broke a parol promise was regarded as guilty of a deceit which was actionable if it operated to the detriment of the person to whom the promise was made. But an action to obtain damages for such detriment would lie only against the actual tortfeasor, not against his executor, in accordance with the maxim *actio personalis moritur cum persona*. But as soon as the purely contractual view of Assumpsit began to make itself felt attempts were made to hold the executor liable for his testator's assumpsits. Thus the history of the process by which an executor became liable for his testator's simple contracts is the history of the development of Assumpsit from an action founded in tort to an action founded in contract.

In Michaelmas 12 Henry VIII⁴ we have the first case reported in which an attempt was made to hold the executor liable for the testator's assumpsit, viz. *Cleymond v. Vincent*. The plaintiff brought an action on the case against the

¹ Calendar of Proceedings in Chancery i xciii. See also Select Cases in Chancery (Selden Society) p. 136 no. 140 A.D. 1454; Kerly, History of Equity 86—7 on this branch of the Chan-

cellor's jurisdiction.

² Ames in Harvard Law Rev. II 1 ff.

³ *ibid*.

⁴ 11 pl. 3.

executors of J. S. and counted that the said J. S. came to his house with one J. N.; the latter purchased certain goods and as the plaintiff was doubtful as to his ability to pay for them, J. S. said to the plaintiff "If he does not pay you I will do so," and relying on this promise the plaintiff delivered the goods to J. N. J. N. proved to be unable to pay the money and J. S. died. The question was, could the vendor now hold the executors of J. S. liable for the detriment he had suffered owing to their testator's breach of his promise? The judges were unanimously of the opinion that the executors were liable, for two reasons, "first because he has no other remedy at the common law but by this action; secondly, because the plaintiff by reason of the testator's promise had suffered a detriment." Fineux, C.J., said the case was entirely outside the maxim as to *actio personalis* "for that is where the hurt or damage is corporeal, as if a man beats me and dies, my action will be gone: but in this case the plaintiff can have what he would have if the party had been still alive, the price of his goods, and therefore the action is not dead, for each party may have his remedy; but it is not so in battery, because the writ cannot say that the executors beat him, and they shall not answer such an action." Fitzherbert, we may note, was counsel for the plaintiff in this action.

This decision by no means settled the law on the point. Fifteen years later¹ Fitzherbert, now on the Bench, was asked by Knightly whether a man could have an action on the case against the executors of another with whom he had entered into a simple contract.

Fitzherbert.—"You will not have an action on the case or any other remedy, for when the testator dies the debt which was due by reason of a simple contract dies also."

Knightly.—"The reason why no writ of Debt lies against the executors is that the testator could have waged his law, and the executors cannot do so, and for that reason they are not liable,"

suggesting that as the testator could not have waged his law

¹ 27 Hen. VIII 23 pl. 21.

in an action of Trespass on the case upon Assumpsit the executors would be liable. Fitzherbert would not admit this and repudiated the authority of the judgment in *Cleymond v. Vincent* which he had himself helped to obtain. "I hold that the law is clearly otherwise, and they did that without any advice, but solely according to their own opinion." When it was pointed out to him that the case was reported in the books he said "Put that out of your books, for it is not law, without a doubt." *Quod nota*, adds the reporter.

Fitzherbert's authority was sufficient to maintain his doctrine for some years. In 37 Henry VIII "'twas agreed, that an Action upon the Case doth not lie against the executors upon the Assumpsit of the Testator, though they have assets¹."

In 4 and 5 Philip and Mary the question was again raised in the case of *Norwood v. Read*². The plaintiff counted against executors on the assumpsit of their testator. The defendants demurred to the declaration saying that it "is insufficient in law, to which the said T. H. and E. R. have no necessity nor are by the law of the land in any wise bound to answer." For the defendants it was argued that executors were not liable for the simple contracts of their testator, and therefore not for his assumpsits, "for every contract executory is an *assumpsit* of itself, and it would be inconvenient to charge them as well by contracts made by parol *in pais* as by specialty, for of the former they cannot have knowledge." The case of *Cleymond v. Vincent* was noticed and an attempt made to put off its effect by suggesting that there the executors had not demurred in law but had pleaded matter in bar and so lost the benefit of the assumption of their ignorance of the testator's parol promise. "And admitting that judgment was there given upon Demurrer, yet please to hear what Fitzherbert says in 27 Henry VIII concerning the same case," quoting Fitzherbert's remarks referred to above, and "he was a Judge of great fame."

The other side put the liability of executors on the true

¹ Brook's New Cases, edition of 1651, p. 7.

² Plowden p. 180.

ground of the rule concerning wager of law, and appealed to *Cleymond v. Vincent*, which "is not so easily to be rejected by the saying of Fitzherbert." It is noticeable that the case was argued on both sides entirely from the point of view of contract. There is no longer any appeal to the maxim as to *actio personalis*. Without solemn argument the judges were unanimous in favour of the plaintiff.

There is no later case against the liability of executors in Assumpsit but the decision in *Norwood v. Read* was not at once accepted as final. The question came up again and was argued at great length in *Pinchon's Case*¹. In the first trial the executor defendants pleaded *non assumpsit*; this was found against them and judgment given for the plaintiffs. Upon this judgment a writ of error was brought and the principal error assigned was "that no action upon the case upon assumpsit for payment of the said debt lies against executors."

The argument for the plaintiff on the writ of error (i.e. the executor) touched on the old objections to the new doctrine. First, it was said that "it is a maxim in law that executors shall not be charged with a simple contract, and that for two reasons; one, because by the presumption of law they cannot have knowledge either of the beginning of the debt, being made by word without writing, or of the continuance of it, because the testator might pay it privately betwixt themselves ...and if an action on the case would lie against executors it would impugn the said maxim of the common law; for every contract executory implies an assumpsit in law." Secondly, the case for the executor reverted to the old view of assumpsit as an action on tort; "this action on the case on assumpsit is *actio personalis quæ moritur cum persona*, for the entry in this case is in *placito transgressionis super casum*, and therefore lies not against executors, no more than if a gaoler suffers one who is in execution to escape, the plaintiff might have an action on the case against the gaoler; but after the death of the gaoler no action lies against his executors for that was founded upon a wrong which *moritur cum persona*."

¹ Mich. 9 Jac. I in B. R. 9 Co. Rep. 86b.

After long argument and many conferences among the judges they were unanimously of the opinion "that the action on the case in the case at bar did well lie against the executors and that not only without impugning any rule or reason of law or any book resolved in the point, but also well warranted and confirmed by divers authorities in law, judgments and resolutions late and ancient."

It was first pointed out that the old rule about the extinction of simple contracts on death was simply intended to prevent an injustice to executors who would have been deprived of a means of defence open to the testator, namely the wager of law—this reason did not apply in this case of *Assumpsit*, for in that action wager of law was not admitted.

"As to the other objection that this personal action of trespass on the case *moritur cum persona*, although it is termed trespass, in respect that the breach of promise is alleged to be mixed with fraud and deceit to the special prejudice of the plaintiff, and for that reason it is called trespass on the case; yet that doth not make the action so annexed to the person of the parties that it shall die with the persons; for then if he to whom the promise is made dies his executors should not have any action, which no man will affirm. And an action *sur assumpsit* upon good consideration to do a thing is no more personal, i.e. annexed to the person, than a covenant by specialty to do the same thing."

For these reasons, and for the further reason that "it is more consonant to justice and common right that the just debt should be paid than the executors, who have the goods in another's right, should convert the goods to their private uses without paying the testator's debts" the judgments in *Cleymond v. Vincent* and *Norwood v. Read* were upheld and the judgment given in the King's Bench in Pinchon's case affirmed.

After Pinchon's case the liability of executors for their testator's *assumpsits* was not questioned except in the case of collateral promises. In *Sanders v. Esterby*¹ in 13 James I the

¹ Cro. Jac. 417.

Exchequer Chamber, *dissent*. Tanfield, affirmed a judgment in the King's Bench which held an executor liable in Assumpsit upon a promise of the testator that he would pay the plaintiff one hundred pounds and leave him as much as he left any of his other children if he would marry the testator's daughter. In *Clark v. Thomson*, 18 James I¹, a similar judgment was given and again upheld on a writ of error in the Exchequer Chamber against the opinion of Hobart; while in *Fawcett v. Charter*, 20 James I², Hobart changed his opinion, though Tanfield still thought the action would not lie. All his colleagues were against him.

The executor was now, in one form or another, liable on his testator's contracts. He had become the personal representative of the testator, so far as English law allows such representation. To pursue his history further would be to write in detail a large branch of English law, and would be beyond the scope of this essay. One point however must be mentioned. Before the Land Transfer Act of 1897 the executor had, as such, nothing to do with the real estate. This did not detract to any important extent from his position as personal representative because it was the personal property that was liable in the first place for the debts. The Act of 1897 has altered even this, and the executor now succeeds *virtute officii* to the whole of the dead man's estate, real and personal alike, although the order in which real and personal assets are applicable towards the payment of the debts remains unchanged³.

[Although the bringing of the executor into the position of personal representative of the testator, which is the main topic with which this essay is concerned, was directly the work of the King's Courts, a short account is here added of the executor in his relations with the Court Christian in order to give a more complete view of his position in England before the sixteenth century.]

The origin of that ecclesiastical jurisdiction in testamentary matters which endured down to the present reign has been a

¹ Cro. Jac. 571.

² Cro. Jac. 662.

³ 60 and 61 Vict. c. 65, s. 2 (3).

fertile source of discussion and dispute among writers on legal history. The jealousy of the secular lawyers inclined them to insist loudly on the fact that the jurisdiction existed only by the allowance of the Crown, which was of course quite true from one point of view, because the restrictions placed by the royal courts on their ecclesiastical rivals by means of the system of prohibitions might probably without very much difficulty have been made narrower than they actually were, so as to exclude the testamentary portion. But the spite of the laymen carried them too far when they denied, as they frequently did, that the clerical jurisdiction over wills was ancient. In 1496 when that jurisdiction, or part of it, was at least three centuries old "Fineux and all the justices...clearly said that the probate of wills belongs to the Court Spiritual only by recent custom, and not by law spiritual¹." That the jurisdiction, whatever its antiquity, existed by the custom of England only, not by the general canon law, was not denied, indeed was expressly and ungrudgingly asserted by Lyndwood, our greatest English canonist².

In Glanville's time the ecclesiastical jurisdiction extended only to the decision of disputes as to the validity or meaning of a will³. "Probate" in the sense of a formal non-contentious process of establishing once and for all the validity of a will does not appear to have been known in England before the thirteenth century⁴. The *probatio solennis per testes* alluded to by Glanville⁵ is not "probate" in this technical sense but simply an incident in a particular suit. But though the two things are perfectly distinct⁶ they have not seldom been confused. Thus Selden, speaking of the law of Glanville's time and relying on the passage from Glanville referred to, says "So the validity of the testament or the truth of this or that particular legacy was to be certified from the spiritual court,

¹ Y.B. 11 Hen. VII 12 pl. 12.

² Lyndwood, Provinciale p. 170.

³ Above p. 39.

⁴ Pollock and Maitland II. 339; Selden, Works, edition of 1726, III 1671, had not seen a probate of a date before Henry III.

⁵ VII 8 "Quia placitum de testamentis coram Iudice Ecclesiastico fieri debet et per illorum qui testamento interfuerint testimonia, secundum juris ordinem terminari."

⁶ Pollock and Maitland II 339.

because the probate had there proceeded, and the copy there remaining was most authentic; otherwise to what purpose should they have sent to the spiritual court in such a case¹?"

The writ given by Glanville² shows that in his time the execution of a will was the affair of the temporal authorities³. Selden shows that it continued so to be during John's reign, though perhaps matters of execution were then *mixti fori*, and further that in the early years of Henry III's reign suits for legacies began to be brought only in the ecclesiastical court⁴. Glanville's writ does not appear in a Register of Writs of about A.D. 1227⁵ and as we have seen Bracton makes the Court Christian the proper forum for the recovery of legacies and even of certain debts from the executor⁶. Meanwhile probate had come into use and by the end of the century a set of rules about it had been elaborated by the practice of the ecclesiastical courts and in the constitutions of papal legates, archbishops and bishops.

Thus before the middle of the thirteenth century the ecclesiastical jurisdiction over wills had reached its fullest extent. In its growth it was practically unhindered by the secular lawyers. The writ of prohibition concerned only matters "quae

¹ Selden iii 1669.

² Above p. 38.

³ Makower, Const. Hist. of the Church of Eng. 425. The report of the Ecclesiastical Courts Commission of 1883 exaggerates the extent of the ecclesiastical jurisdiction in Glanville's time. "The right to compel executors to fulfil their trusts was apparently conceded by the lay courts without difficulty. It is possible that this portion of jurisdiction was won by the clergy as a consequence of the Conqueror's statute; for although, the proof of the exercise of the right being somewhat later, there is no distinct epoch to which the commencement of the exercise might be referred, it is recognised in some points in Stephen's

charter and was an established fact before Glanville wrote" (p. xxiii of the report). In point of fact the functions of the Church Courts in Glanville's time were confined to pronouncing on the validity of the will and deciding disputed questions of interpretation. Stephen's charter recognises nothing more than, first, the right of ecclesiastics to make wills and, secondly, the right of the Church to distribute the property of ecclesiastics dying intestate for the good of their souls. Stubbs, Select Charters p. 120.

⁴ Selden iii 1672—3.

⁵ Maitland, Harvard Law Rev. iii 168.

⁶ Makower 425 n.

non sunt de testamento vel matrimonio¹." It might seem that there was a tacit agreement that the Churchmen should be undisturbed so long as they confined themselves strictly to wills of personal property and meddled not with freeholds—that domain was sacred to the common lawyer².

Many different explanations have been offered of the origin of this ecclesiastical jurisdiction in testamentary matters. Reeves, in his *History of English Law*³, treated it as the outcome of "those laws in the Code (of Justinian) which made the bishop protector over legacies *in pios usus*." His editor, Finlason, thought "a far more natural explanation" was that it came about simply for this reason, that in the age in which it arose few persons could read or write except ecclesiastics⁴. The awkward fact that in some cases the jurisdiction by custom belonged to lords of manors Finlason boldly claims in support of his own theory. "This view is supported by the fact that in many manors the jurisdiction was by custom vested in the lords, no doubt in some cases because they were ecclesiastics, but in others, there can be as little doubt, because they were lettered laymen"—which is more ingenious than convincing. He continues "The notion that the jurisdiction arose from the canon law took its rise in an age when prejudices against everything ecclesiastical often suggested inferences not supported by any authority; and it will be found upon reflection untenable, because it does not account for the fact that the jurisdiction was often in lay lords; and it overlooks the fact that the bishops held only canonical jurisdiction over the portion left for pious uses which could not be available until all debts were satisfied (this being a just principle of canonical, not less than common law), so that the jurisdiction according to the canons could not arise until the estate already was in a great degree administered." Finlason appears here to

¹ Bracton fol. 407b. This form of writ was common in early rolls of Henry III. See Pollock and Maitland II 332 n. 1: "they imply that the legatee can go to the Court Christian."

² Lyndwood p. 172. Where freeholds were still devisable by a local

custom, e.g. in London, the Church was ousted from the testamentary jurisdiction so far as it related to such freeholds. Pollock and Maitland II 328—9.

³ I 330.

⁴ Finlason's note to Reeves loc. cit.

be dealing with the passages in the Code referred to by Reeves, since it is Reeves' theory he is trying to confute. His own theory no more than Reeves' accounts for the jurisdiction being sometimes in lay lords. As to his supposed "fact that the bishops held only canonical jurisdiction over the portion left for pious uses which could not be available until all debts were satisfied" it is in reality no fact at all for the enactments in question attribute to the bishop not only the protection of the gifts to pious uses but also the whole administration of the estate, including the satisfaction of the debts¹. If the "notion" on which Finlason pours such scorn were the result of "prejudices against everything ecclesiastical" it is strange that it was shared by Lyndwood².

Selden³ thought it "probable enough that the original of this jurisdiction for legacies was out of the canon law, and that especially from that canon *si heredes* etc." The canon referred to, c. 6. x. 3. 26, is however a mere imitation of one of Justinian's Novels⁴. The Ecclesiastical Courts Commissioners in their report of 1883⁵ put forward the view that the jurisdiction "was in its origin based on the right of the Church to enforce obligations of honour and faith by spiritual censures; this was subsequently enlarged by the principle laid down that the Church should dispose of the goods of the intestate for the benefit of his soul." This does not seem to afford a broad enough basis for so wide a jurisdiction. The better opinion seems to be that of Reeves⁶. It must be remembered that shortly before the jurisdiction comes into evidence the great revival of the study of Roman law in the twelfth century had

¹ Above p. 11.

² Lyndwood's Provinciale p. 176. He thinks the ecclesiastical jurisdiction over the execution of wills had its origin in Cod. 1. 3. 28 and C. 1. 3. 49 for which see above p. 11.

³ III 1675.

⁴ Nov. 1. 1. 1 above p. 7; c. 6. x. 3. 26 runs "*Si heredes jussa testatoris non adimpleverint ab episcopo loci illius omnis res, quae eis relicta est,*

canonice interdicatur cum fructibus et ceteris emolumentis, ut vota defuncti adimpleantur." It is said to be taken almost bodily from a Frankish capitulary. Kreutzer, *De executoribus testamentariis* p. 34.

⁵ p. xxiii.

⁶ This view has the support of Sir Frederick Pollock and Professor Maitland, II 330 of their book.

spread to England through the teaching of Vacarius. New ideas thus introduced would find courts ready to put them into practice¹.

With the general remark that the jurisdiction in testamentary matters was exercised according to the rules of canon and civil law so far as they applied we may pass to consider shortly the various ways in which the executor had to do with the church courts². Our chief guides will be the works of our two English canonists, John of Ayton and William Lyndwood.

The jurisdiction may be dealt with so far as the executor alone is concerned (i.e. excluding the legatees) under five heads—Probate, Inventory, Insinuation, Commission of Administration and Receipt of Accounts.

(a) *Probate*. The will must be proved by the executor in the court of the Ordinary of the place where the testator's property was situated. As a rule the Ordinary for this purpose was the bishop of the diocese; sometimes abbots or archdeacons had testamentary jurisdiction³. And some lords of manors, also, had the right of granting probate of the wills of their tenants⁴.

If the testator had property in more than one diocese a difficult question of jurisdiction arose. The constitutions of the legate Othobon in 1268 attributed the jurisdiction for purposes of probate to the bishop in whose diocese he died⁵. So far as receiving the executor's accounts was concerned John of Ayton thought the bishop of any diocese where the testator left property was competent to the extent of the property in his diocese. Lyndwood, writing a century later, still held that the rule laid down by Othobon was the canonical

¹ "A great development of the machinery of ecclesiastical judicature followed directly upon the Norman Conquest." *Eccl. Courts Com. Rep.* p. xviii. As to Vacarius see Selden III 1675; Coote, *Ecclesiastical Practice* 31.

² Hale, *Hist. of the Common Law* p. 28: "Where the canon law is silent the civil law is taken in as a director,

especially in points of exposition and determination touching wills and legacies."

³ Lyndwood p. 174 f.

⁴ The origin of this custom is unknown. Pollock and Maitland II 339 suggest that it may be a relic of ecclesiastical ownership of the manors where it occurs.

⁵ John of Ayton p. 107.

one, that one probate was sufficient and that it ought to be granted by the Ordinary of the place where the testator died, while the Ordinary of any place where he left property was competent to make a grant of administration and receive the accounts¹. Practically, however, as Lyndwood notes, the rule had long been obsolete owing to the successful efforts of the two archbishops in their respective provinces to get into their own hands the exclusive jurisdiction in all testamentary questions when the testator left *bona notabilia* in more than one diocese of the province². *Bona notabilia* Lyndwood defines as the minimum required to make a man more than *pauper*, and this was held to be five pounds sterling.

The claim of the archbishops to this "prerogative probate" was keenly but unsuccessfully contested by their provincials. — Then when Thomas Arundel of Canterbury about A.D. 1400 enforced his claim in the diocese of Exeter and appointed a canon of Exeter his commissary and official-general for prerogative cases in that diocese Edmund Stafford the local bishop appealed to Rome, apparently without success³. In 1494 came a bull from Alexander VI confirming the archbishop of Canterbury's claim to prerogative probate, which is therein said to date "a tanto tempore, citra cujus contrarii hominum memoria non existit⁴." A few years later (A.D. 1512) another great dispute arose on the subject between the archbishop and all his suffragans. Compromises were suggested on both sides. The bishops offered to acquiesce in the metropolitan's claim if he would pay one-third of the profits derived from its exercise to the Ordinary of the place where the testator died. This the archbishop refused, and on his side proposed that he should have the probate of all wills whatsoever in his province on condition of paying a third of the profits to his suffragans. Needless to say, this offer was likewise rejected, and no con-

¹ Lyndwood p. 174 m.

² Lyndwood loc. cit. He is concerned only with Canterbury. "Hodie autem in Anglia Archiepiscopus Cantuariensis in sua provincia, tam quoad probationes et insinuationes hujus modi testamentorum, quam etiam

quoad commissionem administrationis bonorum et auditionem computi, omnia talia expedit, ubi decedentes habuerunt bona notabilia in diversis diocesis suis provinciae."

³ Wilkins Concilia III 249.

⁴ Wilkins III 642.

clusion was reached, the bishops appealing to the Pope¹. The canons of 1604 settled the matter on the old lines, allowing the archbishop's claim where *bona notabilia* (fixed at five pounds) were left in more than one diocese and settling the procedure to be followed².

The method of proving the will varied with its character. Nuncupative wills must be clearly proved by the evidence of those who were present when the testator recited his wishes—the evidence of the executor could not be received. Written wills were proved by the evidence of two witnesses—"sufficit namque quoad aequitatem canonicam, ut per duos testes integros omni exceptione majores falsitati non consentientes constet de voluntate defuncti ad effectum, ut demandetur executioni, sive sit facta ad pias causas, sive ad non pias³."

(b) *Inventory*. Having proved the will the executor had next, before he could take any steps to administer the estate except to pay the funeral expenses, and the cost of probate and of drawing up the inventory itself which ought to be paid out of perishable property since such property might be dealt with before the grant of administration was obtained, to draw up a full and exact inventory of all the testator's property, excluding the real estate with which of course he had nothing to do⁴. The necessity of insisting that the executor should draw up an inventory before he was allowed to meddle with the property was frequently laid down in ecclesiastical constitutions⁵. The

¹ Wilkins III 653 ff.

² Wilkins IV 397.

³ Lyndwood p. 174 g; Wilkins II 155.

⁴ John of Ayton p. 107. Lyndwood p. 172 e has an interesting gloss. "Bona enim immobilia.. certo modo disponi debent, quem modum hic non prosequor, quia potius in his standum est regni legibus et consuetudinibus, quas alii in eisdem peritis remitto declarandas." The law and custom with which Lyndwood is concerned are to his mind something quite apart from the "leges et consuetudines regni."

⁵ e.g. Constitutions of Othobon 1268, see John of Ayton p. 107; in the provincial Constitutions of many archbishops of Canterbury, e.g. Boniface 1261, Wilkins I 754; Stratford 1342, Wilkins II 705; Chicheley 1408-1419, Wilkins III 377; and frequently in the decrees of diocesan synods e.g. Exeter 1287, Wilkins II 156; Winchester 1308, Wilkins II 298. See also a letter of Bishop Bronescombe of Exeter to his official in Hingeston-Randolph's Registers p. 283.

executor might be excused from making an inventory (i) by the express direction of the testator, unless the Ordinary thought fit to override such direction, as he always could; (ii) by custom, what custom we are not told; (iii) by the Ordinary himself if circumstances required it¹. An executor appointed "*ad certas res distribuendas*" only was not required to make an inventory; he need only take an oath to carry out faithfully the commission given him². The inventory ought to include all the testator's personal property both corporeal and incorporeal, thus including obligations and other instruments. Debts due to the testator but not secured by deed were not included until they were paid. For his own protection against the debtors, Lyndwood tells us, the executor was required to make the inventory '*coram iudice*,' the debtors' names being inscribed in it. When the inventory was finished it was handed over to the Ordinary *indentatum*, the executor retaining one part, the Ordinary the other³. The penalty for not making an inventory was personal liability to the creditors beyond the value of the assets coming to the executor's hands, and punishment at the hands of the bishop⁴. Moreover as the Ordinary would refuse him a grant of administration he could not make out a good title to sue the debtors of the estate. And an executor neglecting to make an inventory was liable to be removed by the Ordinary as *suspectus*⁵.

(c) *Insinuation* which was the next step consisted in the copying of the will by a clerk of the court and the deposit of the copy among the records of the court. *Insinuatio* according to Lyndwood is equivalent to *publicatio*. He defines it as "*apud acta iudicis publicatio vel transumptio*." It apparently includes and implies an *approbatio* or "*decretum super valore testamenti*"⁶.

(d) *Commission of administration* was not according to Lyndwood absolutely necessary "*quia executor deputatus ad*

¹ Lyndwood p. 176 q.

² John of Ayton p. 108; Lyndwood p. 170 h.

³ John of Ayton p. 107; Lyndwood 177 c.

⁴ Constitutions of Othobon, Wilkins

ii 8.

⁵ Lyndwood 177 g.

⁶ Lyndwood pp. 170 g, 174 h, 181 u. For the rules on the subject he refers to D. 29. 3. 7 and C. 6. 23. 2.

voluntatem defuncti explendam, potest eam ex conscientia propria explere¹." But in order to avoid suspicion he ought to take up his administration before a competent judge i.e. the Ordinary. However that might be, the collections of wills that have been published from episcopal archives show that the *commissio administrationis* was a regular part of the procedure in the ecclesiastical courts. At the bottom of the will is found a record of the probate and of the commission of administration to the executors. For example—

"Probatum fuit presens testamentum coram nobis, Presidente consistorii Londonie, una cum codicillo eidem annexo 11^o Idus Marci...(1389 A.D.). Et commissa est administratio omnium bonorum dictum defunctum et ipsius testamentum concernencium, Waltero Corn, executori in dicto testamento nominato, in forma juris, et per eundem admissa, Bartholomeo Neue, coexecutore interim in eodem testamento nominato, onus administracionis hujusmodi coram nobis expresse admittere recusante. In cujus rei testimonium sigillum etc."²

Frequently when administration was granted to less than the full number of executors named in the will, and the others had not expressly renounced their rights, the Ordinary reserved to himself, when granting administration to the first comers, power to make a similar grant to their fellows.

The grant of administration seems to have been made sometimes before the inventory was drawn up, in spite of the strict rule laid down in the constitutions, for it is not uncommon to find at the end of the record a statement that the inventory is to be produced by such and such a date³.

Having proved the will, exhibited his inventory and obtained a grant of administration the executor was now in a position to administer the estate, that is to get in the debts and pay the creditors and legatees. His relations with debtors and creditors were as we have seen after about 1290 A.D. the

¹ p. 170 h.

² Furnival, *Fifty Earliest English Wills* p. 2.

³ e.g. "et habent ad exhibendum

inventarium citra festum pentecosti proximum jam futurum," Furnival p. 54.

affair of the secular courts¹. But he was also protected by ecclesiastical sanctions in his administration². If any one whether clerk or layman hindered the execution of a will, or procured such hindrance, he was liable to punishment by the spiritual sword as a violater and disturber of the ecclesiastical liberties. Lyndwood discusses the conditions under which a person who occupies and detains the testator's property, so that the executor cannot do his duty, incurs this penalty. The discussion raises many interesting points. Must the transgressor be specially warned and required to give up the property before the hand of the law falls on him? The answer is, Yes, if he does not know that the will cannot be executed without the particular piece of property he is withholding; if he does know this then no requisition is necessary "*nam eum qui certus est certiorari non oportet.*" If it is doubtful whether he knows or not then he ought to be presumed not to know, for where a statute is penal it should be interpreted *in benig-niorem partem*. Then what is a sufficient requisition? *Oblatio libelli* we are told is not enough; *litis contestatio* alone is sufficient to bring down the extreme penalty. Suppose a testator with property worth £100 gives £50 to his executors to distribute and £20 worth of it is detained by some one who is not executor. Can an action be brought to enforce the penalty? No, says Lyndwood, unless the £20 worth includes some specific legacies, because the detention does not amount to a hindrance in the execution of the will, since the executor can get enough from the rest of the estate³.

We have seen⁴ that in the time of Bracton the proper forum for a legatee proceeding against the executor to enforce the payment of his legacy was the Court Christian. We have the authority of John of Ayton⁵ for saying the same of the

¹ We may here however notice John of Ayton's views as to the relation between the creditors and the executor. He discusses, p. 109, the question whether a creditor or a legatee ought to sue the executor or the heir first, and comes to the conclusion that it

should be left to the option of the creditor or legatee himself.

² Constitutions of John Stratford, Lyndwood pp. 171, 179.

³ Lyndwood 175 f.

⁴ Above p. 43.

⁵ John of Ayton p. 109.

fourteenth century, and Lyndwood will answer for the fifteenth¹. But from the legatee's point of view the procedure of the ecclesiastical courts was by no means wholly satisfactory, and the records of the Chancery during the sixteenth century show us legatees appealing to the equitable jurisdiction of the Chancellor for that justice which the Church could not or would not give. It was at first with some hesitation that the Chancellors entertained such matters. In 1575 in the case of *Cliffe v. Cliffe*² the defendant in a Chancery suit demurred to the jurisdiction of the court on the ground that the question at issue between himself and the plaintiff was a "legatory matter" and therefore belonged to the ecclesiastical forum. His demurrer was overruled. A few years later in *Nelson v. Norton*³ (1591) a similar demurrer was allowed. During the Chancellorship of Lord Ellesmere (1596—1617) the practice seems to have been still unsettled⁴. By the middle of the seventeenth century however the jurisdiction of the Court of Chancery over legacies was well established and was based on the doctrine of trusts. The executor was held to be a trustee to pay the debts and legacies and therefore amenable to coercion by the Chancellor. "The general trust of a will is to pay debts and legacies and of the surplusage to account to the Ordinary in *pious usus*"⁵. In exercising the jurisdiction thus acquired the Court of Chancery followed the ecclesiastical courts in applying the rules of the civil law relating to legacies⁶. Although the concurrent jurisdiction of the Church courts seems not to have been denied yet the more effective procedure of the Court of Chancery, for example in enforcing discovery, soon attracted to it nearly the whole of the jurisdiction over legacies. In the eighteenth century attempts were even made, and for a time successfully, to enforce the payment of legacies at common law on the ground of a promise by the executor to pay. In *Atkins v. Hill*⁷ (1775) Lord Mansfield

¹ Lyndwood p. 169 b.² Monro, *Acta Cancellariae* p. 425.³ Monro p. 10.⁴ Kerly, *History of Equity* p. 140.

See Tothill p. 129, Monro p. 109.

⁵ Cary p. 28. For the notion of

executorship as a trust, see Tothill pp. 86, 129.

⁶ Lord Mansfield in *Atkins v. Hill*, Cowper 284. Kerly p. 140.⁷ Cowper 284.

and the other judges of the King's Bench entertained such an action without deciding the general question as to the jurisdiction in matters of legacy. He said "No doubt but at any time after an executor has assented the property vests; and if it be a pecuniary legacy, an action at law will lie for the recovery of it.....in the present case there is not only an assent to the legacy, but an actual promise and undertaking to pay it: and that promise founded on a good consideration in law." *Hawkes v. Saunders* (1782)¹ carried the matter a step further—in that case there was no express promise or assent by the executor, but the court gave judgment for the legatee on the ground of an implied promise. Lord Mansfield said "Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori* a legal or equitable duty is a sufficient consideration for an actual promise....In such and many other instances, though the promise gives a compulsory remedy, where there was none before either in law or equity; yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration....But an executor who has received assets is under every kind of obligation to pay a legacy....He ought to assent if he has assets." Twelve years later however this novel extension of the common law jurisdiction was abandoned. In *Deeks v. Strutt*² (1794) the facts were the same as in *Hawkes v. Saunders* but Lord Kenyon, with whom the other judges concurred, repudiated jurisdiction. "The supporting of the present action," he said, "would be attended with the most pernicious consequences; and I believe that no action till lately (except one, in the time of the commonwealth) for a legacy has been supported in an action of law. If an action will lie for a legacy, no terms can be imposed on the party who is entitled to recover; and therefore when a legacy is given to a wife, the husband would recover at law, and no provision could be made for the wife or family; whereas a court of equity will take care to make some provision for a wife in such a case. But the whole of this admirable system,

¹ Cowper 289.

² 5 T.R. 690.

which has been founded in a court of equity, will fall to the ground if a court of law can enforce the payment of a legacy. The only case that I know of where it was said that this action might be maintained happened in the time of the commonwealth, but the reason there given was to prevent a failure of justice, the ecclesiastical courts being at that time abolished, and the Court of Chancery not having then, nor indeed until the time of Lord Chancellor Nottingham, entertained any jurisdiction over the question of legacies." *Deeks v. Strutt* was the last case in which an attempt was made to enforce payment of a legacy in a court of common law.

(e) *Receipt of Accounts.* When the administration of the estate was finished the executor had to come into court to give account of all the property that had passed through his hands. The testator could not absolve the executor from the necessity of giving an account¹, nor could the Ordinary².

The executor need not, if a man of good repute, go into minute details—for small things his word must be taken, but as to greater he must specify more particularly and swear to the truth of his accounts. He ought to account specially for the payment of all specific legacies; such payments were easy of proof. As regards small charitable bequests, where proof would be difficult, his oath ought to be accepted³. If his accounts were satisfactory the executor received letters of acquittance from the Ordinary and his functions were then at an end.

The legatees were entitled to be present when the executor gave in his accounts in order that they might have an opportunity of impeaching them if necessary⁴. But the creditors

¹ John of Ayton p. 109.

² Lyndwood p. 183 c. "redditiō namque rationis non solum concernit Ordinarium, sed alios quorum interest." See also Wilkins III 377. Some wills purported to release the executor from giving an account when he was also residuary legatee; *Testamenta Eboracensia* (Surtees Society) I 95, 126, 178; and perhaps in such

cases the rule was relaxed. For a specimen of an executor's accounts see Hingeston-Randolph's Registers of Exeter, Bishop W. de Stapeldon, p. 407.

³ John of Ayton p. 109; Lyndwood 177 n.

⁴ Lyndwood 177 p. "Et forte reddent rationem legatariis praesentibus, quibus forsā integre solutum non est, cum ipsorum intersit."

had no such privilege, and hence came another extension of the jurisdiction of the Court of Chancery. Unpaid or only partly paid creditors, unable to attack the executor's accounts in the Court Christian, sought and obtained a remedy from the Chancellor who not only required the executor to swear to his accounts and allowed the creditor to contest them but also decreed payment of the latter's debt if he could establish the existence of assets, which the Chancery process of enforcing discovery would help him to do¹.

It was a rule frequently enforced by the constitutions that the executor must make no profit out of his administration². Archbishop Stratford ordained that no executor should apply or appropriate to himself any of his testator's property under the pretence of purchasing it or in any other way, except in the case of a legacy or a debt owing to him by the testator, or on account of expenses incurred or an honorarium allotted to him by the Ordinary for his trouble³. John of Ayton⁴ thought the executor might validly buy property belonging to the estate if he did so in public, but not in secret. Lyndwood allows the executor to purchase only in two cases. If the executor has *bonâ fide* sold the property to a stranger and the latter fails to pay the price, the executor may then step in, pay the money (if it be *justum pretium*) and keep the article, for this is not a new sale but a transference of the former sale to the executor. Again, if the article is exposed for public sale at a fair price, and no one bids more for it than he, the executor may purchase it if he does so openly and *bonâ fide*⁵.

If no provision was made in the will for rewarding the executor for his trouble he could not demand or retain anything on this account. The Ordinary might assign a sum to him but he could not claim it as of right⁶.

If the testator in his will did not expressly provide for the disposal of the residue of his property after the debts and

¹ Spence, *Equitable Jurisdiction* I 580.

² e.g. Worcester 1240, Wilkins I 674; Winchester 1308, Wilkins II 298; see Lyndwood p. 170 h.

³ Wilkins II 706.

⁴ p. 106.

⁵ Lyndwood p. 178 g.

⁶ *ibid.* p. 178 p.

legacies were paid, then if it could be gathered from the terms of his will that he wished the residue to be applied in the manner provided by the rules of intestate succession this course must be pursued, so that he might be said to die intestate so far as the residue was concerned. If no such intention could be gathered from the will the executors were entitled to retain the residue to their own use. But in the latter case the penalty provided by the constitution of Archbishop Stratford previously mentioned¹ could not be enforced against any persons detaining the residue, for such detention could not be said to prevent the execution of the testator's wishes. It was otherwise if the testator's intention as to the disposal of the residue could be gathered from the will². Lyndwood advises the executor to dispose of the residue according to the advice of the Ordinary³. Many constitutions urged on testators the duty of devoting their residue to pious uses⁴. Gifts of the residue to executors to dispose of for the good of the testator's soul were very frequent⁵.

On the analogy of *tutor suspectus* an executor might be removed from his office by the Ordinary if he did not administer in good faith, or even before he had begun to administer if his character was such that he could not be trusted. Mere poverty was not a ground for removal⁶. A refusal to give a co-executor information as to his administration was a good reason for removing an executor⁷. The removal of an *executor suspectus* was a public matter, that is it could be moved by any one, even if the will contained no legacies *ad pias causas*⁸. But although he might be removed the executor could not voluntarily retire from his office. He was free to take up the office or not but once undertaken it could not be relinquished at his own free will⁹.

¹ Above p. 73.

² Lyndwood p. 178.

³ *ibid.*

⁴ e.g. Wilkins i 583, 596, ii 155 etc.

⁵ e.g. Testamenta Eboracensia i 4, 97, 123, 166 etc.

⁶ Lyndwood p. 177 g. "Nam sus-

pectus dicitur, non qui pauper est, sed quem mores faciunt suspectum." Pollock and Maitland ii. 341.

⁷ Lyndwood p. 177 n.

⁸ *ibid.*

⁹ John of Ayton p. 108.

CHAPTER IV.

THE EXECUTOR IN FRANCE.

AFTER the Burgundian Visigothic and Frankish tribes which made up the immigrant population of France had fairly settled down in their new homes, under the sovereignty of the family of Clovis, they rapidly adopted the practice of testamentary disposition, mainly owing to the influence of the clergy. A complaint of the Frankish king Chilperic (ob. A.D. 584) preserved for us by Gregory of Tours shows that the clergy made good use of their influence in their own interests¹. Many councils of the Frankish Church threatened with excommunication heirs refusing to execute legacies in favour of a church or monastery², and the wills preserved in the collections of formularies show how frequent and generous such legacies were. The laws of the Burgundians and Visigoths as we have seen recognize the practice of making wills, and the native population including nearly all the clergy seem never to have ceased to make use of them. By the time of Charlemagne wills were so generally made that Alcuin, wishing to give a son of the Emperor a definition of death, called it "the confirmation of testaments³."

Frankish law provided no means of enforcing the terms of wills, and the insufficiency of ecclesiastical sanctions to

¹ Greg. Tur. Hist. Franc. vi 46
"Ecce pauper remansit fiscus noster, ecce divitiæ nostræ ad ecclesias sunt translatae...Haec agens, assidue testamenta, quæ in ecclesias conscripta erant, plerumque dirupit."

² Glasson, Hist. du droit et des

institutions de la France iii § 17; Councils of Vaizon A.D. 442, Orleans 541, Rheims 625, Hefele's Hist. of the Councils (Eng. translation) iii 165, iv 212 and 446.

³ Guizot, Civilisation en France ii 192.

ensure the execution by the testator's heir of the legacies *ad pias causas* which were very common led to the appointment in wills of persons specially to attend to these matters. An example of such an appointment of *eleemosynarii*, as they were called, is found in a will of about A.D. 840¹.

In Christi nomine ego Heccardus cogitans humanum casum fragilitatis meae, ideo mihi visum fuit, ut res meas quas haereditavi et adquisivi, cum omni substantia, ut pro salute animae meae,...in manibus viris istis mea eleemosina commendassem, quod ita et feci. Id est dominus Leutboldus...etc.

Then follows a list of the *eleemosynarii* and of the legacies, which the testator adjures them in terms of extraordinary solemnity to carry out. Of the position of the *eleemosynarius* generally but little seems to be known—we might perhaps infer that it was just because there was no legal means of compelling him to perform his duties that the testator employed such strong terms of imprecation in the case of his failing in his trust. Another very interesting will, this time of the tenth century (A.D. 928) shows us the testator expressly giving his *eleemosynarii* very wide powers. It is the will of Acfred, Duke of Aquitaine.

“Ego in Dei nomine Acfredus...dispono distribuere omnes facultates meas tam mobiles quam immobiles in usus ecclesiarum et Ecclesiae Ministrorum et in cibos pauperum...Quamobrem obsecro vos fideles et amicos meos Rotbertum Vicecomitem, Dalmatium, Bertrannum, Eustorgium, Arimandum, Arlebaldum Praepositum, Cunabertum Decanum, ut sitis *eleemosynarii mei*; sicut estis fidelissimi amici, ita sitis mearum rerum distributores. Dono enim vobis potestatem erogandi omnes meas res tam mobiles quam immobiles, in annona, in vino, in auro et argento, in bestiis, in vestimentis, in alodio, et in cuncta supellectile mea, in usus Ecclesiarum, in Sacerdotum et Ministrorum Ecclesiarum, in cibos pauperum et peregrinorum quaecumque invenire poteritis. Habeatis etiam potestatem incartandi alodes meos quibus jussero, et servos ingenuos

¹ Thévenin, Textes relatifs aux institutions privées et publiques aux époques Mérovingienne et Carolingienne, no. 76, p. 100.

faciendi de quibus mandavero, obmallandi omnes debitores meos, et requirendi debita mea, et indulgendi quibus dignum videritis, et pacificandi reclamatores meos sicut dignum perpexeritis¹."

There can be no doubt that the usage of *eleemosynarii* familiarised men's minds with the interposition of a third person between the heirs *ab intestato* and the beneficiaries, and so prepared the way for the testamentary executor in the modern and general form, while at the same time this consideration need not lead us to deny that the true executor is in origin a *salmann*².

The tenth and eleventh centuries were in France a period of legal anarchy caused by the dissolution of the system of 'personal' laws and the gradual formation of an infinite variety of local customs³. The end of this period preceded by a little the appearance of the executor in legal history, and in order to make clear what follows a few words must be said of the legal condition of France as it appeared from the early part of the twelfth century onwards.

For seven centuries the main feature of what we may call the legal map of France was the division of the country into two clearly marked regions, one to the north, the *pays de droit coutumier* or *pays de coutumes*, governed by a multitude of different systems of law or *coutumes*, the other, to the south, the *pays de droit écrit*, for which the Roman law was a common law.

The *pays de droit écrit* was that part of France where Roman civilisation had taken earliest and deepest root, and where the population was least mixed with Teutonic blood⁴.

¹ Baluze, *Capitularia Regum Francorum* tome II 1532—4.

² See Le Fort, *Des exécuteurs testamentaires* p. 22.

³ Esmein, *Hist. du droit français* 714 ff.

⁴ H. Klimrath, *Travaux sur l'histoire du droit français*, ed. by Warnkoening; II 220—"Les pays de Droit écrit sont ceux où la domination ro-

maine s'établit le plus tôt et se conserva le plus tard; où les lois romaines avaient jeté les racines les plus profondes dans les mœurs des populations vaincues, transformées par le voisinage et par de nombreuses colonies; où cette population fut le moins mêlée, par la suite, de conquérants barbares; où les institutions romaines survécurent par conséquent en grande

But though the *pays de droit écrit* recognised the Roman law as their common law, they were not without their local customs, which superseded that law within their own sphere. The great cities of Montpellier and Toulouse especially, as we shall have occasion to notice hereafter, had each a considerable body of local custom, which in many ways resembled the customs of the north rather than Roman law¹. The greater part of the custom of the Midi, however, consisted of modified Roman law as it had been practised in those parts of the country during that "dark age" of legal history which preceded the great revival of the study of Roman law in the early part of the twelfth century².

Conversely, the Roman law was not without authority in the *pays de coutumes*. There were many gaps in the customary law and an influential school of lawyers were of the opinion that these gaps should be filled up with doctrines taken from Roman law. Though this school never gained complete ascendancy, so as to introduce any great bulk of Roman law into the *Coutumes*, its influence was very appreciably felt³.

With these qualifications we may say that France from the twelfth century onwards was divided legally speaking into a Roman and a non-Roman or Germanic-feudal part. The Customs of the north differed infinitely one from the other in details, but there was, as a rule, agreement in their difference

partie dans les relations privées, comme dans l'organisation municipale, à la destruction même de l'Empire. Aussi cette distinction commence-t-elle à poindre dès que le principe des lois personnelles s'affaiblit."

¹ Klimrath op. cit. 222; Esmein p. 719.

² Klimrath op. cit. 222; Esmein 721—"En effet, en s'appropriant une législation, faite tant de siècles auparavant et pour une civilisation aussi différente, ils avaient dû nécessairement en changer le sens et la portée véritables. La pratique et la doctrine s'étaient ingénérées à la mettre en harmonie avec les besoins et les idées des

temps nouveaux. Il s'était fait tout un travail d'adaptation et d'interprétation, analogue à celui qui a produit dans les pays allemands le droit romain moderne (Heutiges römisches Recht), celui qui forme encore la base et le fonds commun de leur droit privé."

³ Esmein p. 723; Klimrath op. cit. 220—"Le Droit Romain planait au-dessus des coutumes et des lois positives, comme une sorte de logique universelle appliquée au Droit; on y trouvait des règles d'interprétation, des règles supplétives, des analogies fécondes."

in this, that they all differed from the corresponding Roman law of the south.

A glance at the law of testaments and testamentary execution at once renders the difference between the two systems apparent.

In the *pays de droit écrit* the rules of Roman law were in force as to the form, the contents and the execution of wills. Down to the break up of the *ancien régime* at the end of the eighteenth century it was the strict rule that every testament must contain the institution of an heir¹. To this rule there were few exceptions. In Toulouse and Montpellier the institution of an heir was unnecessary in the case of women and of childless men. Article 123 b of the *Coutumes de Toulouse*² runs—

“Est usus sive consuetudo Tholose quod quilibet non habens liberum vel liberos potest legare omnia bona sua non conditionata in testamento suo, cuicumque sue placuerit voluntati et sine heredis vel heredum institutione, et tale testamentum obtinet efficaciam et valorem.”

Sons must either be instituted heirs or made legatees by their fathers.

“Noverint...quod usus et consuetudo est Tholose quod homo quilibet masculus tenetur et debet filium suum seu filios instituere heredem vel heredes in testamento suo, vel dare ei vel eis in dicto testamento aliquid, scilicet quinque solidos Tholosanos³.”

Even in Toulouse this customary exception was discarded by order of Philippe le Bel in favour of the general rule of the *pays de droit écrit* when the customs were collected and revised under the royal supervision in 1286⁴.

Just as the Roman rule requiring the institution of an heir was generally adhered to in the *pays de droit écrit* so also was the Roman principle requiring the instituted heir to pay the

¹ Glasson VII 549; Viollet, Hist. du droit civil français p. 899.

l'histoire du droit.

³ art. 123 d.

² Published by A. Tardif in his Textes pour servir à l'enseignement de

⁴ See Tardif's Introduction vi ff. Glasson VII 549.

legacies. The testamentary executor indeed was almost unknown in the south. One of the jurists who drew up the Code Napoléon called the executor "the invention of the *droit coutumier*¹."

In the rare cases when a testamentary executor was appointed in the *pays de droit écrit* his rights and duties were determined by the application as far as possible of the rules of Roman law relating to the contract of mandate². As a result the executor's rights and duties were confined within a very limited sphere. The Roman law of mandate supplied no materials from which to furnish him with anything but very restricted powers. His only duty was to watch over the execution of the will committed to his care. But the law vested none of the testator's property in him on the latter's death, and except for legacies *ad pias causas*, which were governed by the exceptional provisions of Roman law already referred to³, there was no action that the executor could bring to compel the heir to hand over to him the property bequeathed in order that he might pass it on to the legatees. The legatees on the other hand had no action against the executor—they must claim their legacies from the heir⁴. Nor had the executor as such any legal relations with the testator's debtors and creditors. Without a special mandate he could neither sue the debtors nor pay the creditors⁵. We need not wonder that the appointment of an executor was rarely met with in the *pays de droit écrit*, seeing that such an appointment gave the executor practically no legal rights or duties whatever. The Roman law of wills in fact had no convenient place for the executor—it rested on the institution of the heir, which was *fundamentum totius testamenti*, and to introduce an alien element was to disarrange the whole edifice.

In the *pays coutumiers* on the other hand Roman law had little or no influence on the form and contents of the will. The Roman law required seven witnesses to a will, but the Church,

¹ Maleville, *Analyse raisonnée de la discussion du Code Civil au conseil d'état* II 420.

² Furgole, *Œuvres Complètes*, 1776,

t. IV p. 153.

³ Above p. 8.

⁴ Furgole p. 157.

⁵ Furgole pp. 158, 159.

whose influence in testamentary matters was very considerable even in those countries where she had not, as in England, the exclusive legal cognizance of them, had always urged on the strength of a text of Scripture that two or three witnesses were sufficient, especially when the will was drawn up in the presence of a priest. Alexander III in 1172 authorised vicars and curates to receive testaments in the presence of two or three witnesses, and this rule was adopted in nearly all the *Coutumes*¹. In the *pays de droit écrit* this decretal met with vigorous resistance and the Roman seven witnesses remained the rule².

In its necessary contents, too, the will of the customary law differed from the Roman will of the south. The famous maxim *institution d'héritier n'a lieu* expressed the rule of nearly all the *pays coutumiers*. The customs of Berry were exceptional in allowing the institution of an heir³—so was the *Livre de Jostice et de Plet*, a thirteenth century law book of little influence⁴. In some of the *Coutumes* the institution of an heir, although null and void as such, was good as a legacy⁵; others did not allow it even this extent of operation⁶.

French testators, therefore, living under the *droit coutumier* were in the dilemma which everywhere brought about the introduction of executors. In default of such a testamentary heir as was provided by the Roman law, whose own rights depended on the upholding of the testament and for whose faithful execution of its other provisions a well-tryed, though sometimes imperfect, system of remedies was provided, the execution of the will devolved on the heirs *ab intestato*, who would be very liable to neglect the directions left by the ancestor in favour of the Church or of strangers. We should therefore expect to find in the *droit coutumier* the institution

¹ e.g. *Coutumes de Paris* art. 289, in Bourdot de Richebourg's *Nouveau Coutumier Général*. By way of exception in Artois the Roman rule requiring seven witnesses was adhered to.

² *Glasson* vii 542.

³ tit. 18. art. 1.

⁴ *Glasson* vii 549. For examples of the rule see *Nivernais* xxxiii 10, *Vitry le françois* 101; *Guy Coquille*, *Institution au droit des François*, Paris, 1630, p. 400; *Viолlet* p. 899.

⁵ *Paris*, 299; *Sens*, 70.

⁶ *Senlis*, 165; *Troyes*, 96; *Blois*, 137.

of testamentary executors well developed, and this expectation is not disappointed by an examination of the various *Coutumes*. Nearly all of them contain a few articles on executors, and the use of these functionaries was very general throughout the north and centre of France¹. But though it is true that nearly all the *Coutumes* have something to say of executors, that something is never very much and occasionally altogether wanting. It follows that many important questions relating to executors could not be settled by a mere reference to the *Coutumier* of the particular district. How then were such moot points to be decided? Furgole² gives us this rule—

“Il faut d'abord avoir recours à la Coutume locale pour fixer l'étendue du pouvoir et des obligations de l'exécuteur testamentaire, parceque c'est la loi à laquelle on est soumis ; mais si la Coutume locale est muette, il faut décider la question par la Coutume de Paris, dans les cas qu'elle a décidés ; que si la Coutume locale et celle de Paris sont muettes on doit se régler par les principes généraux du pays coutumier ou par les Coutumes voisines. Enfin s'il s'agit d'une question qui ne soit pas décidée par les Coutumes on doit avoir recours aux règles du Droit écrit sur le mandat ; parceque la Loi Romaine y est toujours considérée comme raison écrite³.”

This method of treatment was not calculated to lead to great results in the way of magnifying the powers and duties of the executor, even when supplemented by the general principle, which also Furgole applies, that the executor must be held to have whatever powers are absolutely necessary to enable him to execute the will. For if the executor was a mandatary his powers must be strictly limited by the terms, not only of the local custom, but also of the mandate given him, for *diligenter fines mandati custodiendi sunt*⁴.

Accordingly we shall be prepared to find that the executor in the *droit coutumier* is a much less prominent person than

¹ Viollet p. 900.

² p. 153.

³ All the old writers agree that the executor is a mandatary—“la chose parle d'elle-même” says Furgole p. 152.

See also Godefroy's commentary on “La Coutume Reformée de Normandie,” 1684, vol. II p. 147.

⁴ D. 17. 1. 5. 1.

his contemporary in the law of England, especially in view of the greater strength and duration in the history of French law of the influence of those feudal ideas on the devolution of property which attached paramount importance to its transmission in the strict line of descent and which, regarding every one of the sons of a noble as himself noble, required provision to be made for the younger members of the family.

No one was bound to take up the office of executor but once assumed it could not be laid down at will—"voluntatis est enim suscipere mandatum, necessitatis consummare¹."

The executor was not as a rule required to prove the will before a public authority or to obtain a grant of administration. For instance article 251 of the *Coutumes de Lorris* runs—

"Il n'est requis insinuation ou signification des dons, et dispositions faicts tant entre-vifz que par testament ou ordonnance faicte pour cause de mort, à quelque valeur que ce soient et se puissent monter les choses données leguées ou disposées."

Brittany, where ecclesiastical influence was very strong, was an exception. It seems that there the will had to be proved before the ecclesiastical judge and a grant of administration obtained from the lay court².

"La congnoissance da la solennité des testamens appartient aux Juges d'Eglise: et après estre declarez solennels, la delivrance des biens se fera par la justice seculière, qui baillera les biens qui furent au deffunt à ses exécuteurs s'ils le requierent."

In Arras also a decree of the judge, apparently the lay judge, was required before the executor could take possession of the property.

"Les executeurs de testamens ne sont habils à eux immiscer et entremettre ès biens de l'exécution que premier ils n'y soient tenuz et decretez de droict par Juge compétent³."

¹ D. 13. 6. 17. 3. Godefroy op. cit. Bretagne.
p. 147; Furgole pp. 154, 155.

³ Art. 32 of the *Coutume*. So also

² Article 614 of the *Coutumes de* Artois, 182.

The general rule was that no such authorisation was required; Furgole¹ gives as the reason for this that as the executor is a true mandatary his mandate gives him sufficient power to act.

If the executor was to be able to exercise his functions with any effect it was necessary that he should have the possession of at least some part of the testator's property. Now the effect of the rule expressed by the maxim *le mort saisit le vif* was that the heir was seised of the whole of the property of his ancestor immediately on the latter's death, there was no break in the continuity of the possession. Hence if the heir was unwilling, as he often would be, to assist him the executor would find it very difficult to do his duty.

Accordingly testators had recourse to the practice of giving the possession (*saisine*) of a portion of their property to the executor. At first it was necessary to do this during the testator's own life-time². This was effected by a declaration in the will that the testator held the property only as a *precarium* from the executor. Thus in the will of Jeanne de Chastillon, Comtesse de Blois, of A.D. 1291³ we read—

“Desquels meubles et heritaiges je baille la saisine à mes exécuteurs, et me établis possessaressse en nom d'aus et pour aus, et connois que cette possession, comme j'en ai et auray, ou sera trouvée pardevers moy au temps de ma mort, que je l'ai et aurai, et avo à avoir en nom d'aus, et veill que après ma mort, la possession recourt à aus et demeure entièrement jusques à tant que toutes mes daïtes, tous mes torfez, tous mes laïs, toutes mes aumosnes, tuit mi don, et toutes mes ordenances soit en ce present testament, soit ès ordonnances clauses, soit par mes lettres pendans soient accomplis entièrement à l'avisement et à la conscience de mes exécuteurs.”

The executor's possession was confirmed by handing over to him the will containing a clause of the kind described. The following is from a will of A.D. 1307⁴—

¹ p. 161.

³ Laurière p. 222.

² Laurière, Glossaire du droit François p. 221.

⁴ Quoted by Laurière p. 222.

“Me de meis bonis mobilibus, conquestibus et quinta totius terrae et hereditatis meae in manu dictorum executorum dessaisiens, ipsosque, et quemlibet ipsorum investiens per traditionem praesentium litterarum.”

The *Grand Coutumier* alludes to this practice—

En testament il est par autre manière : car le testateur est en tel estat qu'il ne se peut desaisir, et pour ce il se desaisit ès mains de ses exécuteurs par la tradition de son testament¹.

The custom of giving the executor the possession of a certain portion of the inheritance was afterwards adopted and enforced by the various *Coutumes* and thenceforward it was unnecessary to provide for it in the will. Originally given at the discretion of the testator, it soon became the legal right of every executor under the *droit coutumier*; it was going back to the old state of things when the Code Napoléon abolished the executor's inalienable right of possession, and again placed the matter within the testator's discretion².

The *Coutumes* may be divided into four groups according to the greater or less extent of the property of which the possession was given to the executor³.

1. The most important of all the *Coutumes*, that of Paris (art. 297), followed by those of Calais (90), Clermont en Beauvoisis (134), Troyes (99) and very many others, gave possession of the movable property only.

2. Those of Sens (75), the Bourbonnais (295), Anjou (274), Maine (291 “et faute de meubles et acquets de la tierce partie du patrimoine”) extended the executor's possession to the movable property and the *conquêts* or acquired, i.e. not inherited, landed property. The *Coutumes de Lorris* (244) gave similar possession but only up to the amount required to execute the will.

3. The *Coutumes* of Berry (t. 18 art. 22), Chalons (74), la Rochelle (68), Angoumois (113), Blois (177), Poitou (271) gave possession of the movables up to the amount required to execute the will. Those of Blois and Poitou went further

¹ Grand Coutumier Bk. II ch. 21.

² Code Napoléon art. 1026.

³ Coquille p. 394; Furgole pp. 157,

158; Le Fort p. 41 ff.

and gave possession of the immovables if the movables were not sufficient.

4. The most generous system was that of Orléans (290)—“Les exécuteurs du testament sont saisis des biens meubles et héritages du testateur, jusqu'à la valeur et accomplissement du testament.” Clermont (ch. 7 art. 9) followed Orléans.

Meubles was held to include, besides movable property strictly so-called, debts not secured on land or houses, and the revenues of immovable property accrued before the testator's death. Revenues of immovables accruing after the testator's death were not included, but treated as immovable property¹.

The testator might restrict but could not extend the possession given by his local custom, for says Pothier² “it is by virtue of the law that the executor has possession of the testator's property: since it is accorded by the law for the benefit of the testator, the latter can derogate from a right which is established only for his own benefit, and restrict it; but he cannot extend it, for he cannot by his own will give his executor possession of his property after his death, since only the law can give the executor such possession³.” For example, under the *Coutumes de Paris*⁴ a testator could not give his executor possession of any part of the immovable property, but he could validly restrict the executor's possession of the movables to a certain value, or to the sum required to satisfy the debts and legacies.

A further limitation of the executor's possession was imposed in many of the *Coutumes* by a provision that the heir could get rid of that possession by offering the executor a sum of money sufficient to pay all claims arising under the will; such an offer the executor was not at liberty to refuse. A clause to this effect was found in the customs of Meaux (37), Melun (252), Chalons (76) and some others⁵; Ricard⁶ held that the rule must be applied generally, even when the *Coutu-*

¹ Ricard, *Traité des Donations entre-vifs et Testamentaires*, ed. 1685, t. 1, p. 396; Furgole p. 161.

² *Œuvres Complètes*, ed. 1827, t. vii, p. 345.

³ See also Ricard i p. 397.

⁴ Art. 297.

⁵ See Beaumanoir, *Coustumes de Beauvoisis* xii 33, 56.

⁶ i 398.

mier of the district was silent, unless the will contained legacies of immovables as well as of movables. But some of the *Coutumes* e.g. Troyes (99) forbade the heir so to dispossess the executor¹.

The executor's "possession" was a mere detention, not possession in the full legal sense—in that sense the heirs were the true possessors in virtue of the maxim "*le mort saisit le vif*." Ricard² says—

"La possession des exécuteurs n'est pas une véritable possession, attendu qu'ils n'ont aucun droit réel *in re*, ny *ad rem*; mais qu'ils sont établis par la coutume, par forme de séquestres et de commissaires, afin que comme d'une main tierce, il puisse être pris ce qu'il faut des meubles pour exécuter le testament du défunt, et le surplus rendu aux héritiers, lesquels ne laissent pas d'estre véritablement saisis, et d'être les vrais propriétaires et possesseurs, les exécuteurs ne possédans qu'en leur nom."

Before entering on the possession given him by law the executor was bound to make an inventory of all the property to which that possession was to extend. Before making the inventory he was strictly forbidden to meddle with or administer the property, except in very urgent matters such as the funeral. The inventory must be drawn in the presence of the heirs, if any appeared to be within the bailiwick; otherwise in the presence of the royal procurator or other public official in the testator's domicile³. Ricard⁴ thought that the testator could validly excuse the executor from making an inventory; others, including Pothier⁵, thought not, on the ground that the executor held his possession only from the law and must take it subject to all restrictions imposed by the law.

As soon as he had drawn up his inventory the executor could begin his administration of the estate. This consisted of (a) getting in the debts, (b) paying the creditors, and (c) paying the legatees.

¹ Le Fort p. 44.

⁴ I 399.

² p. 394.

⁵ VII 348.

³ Pothier VII 348.

(a) The executor's right to collect the debts owing to the testator was a consequence of the possession given to him by the law and of his duty to do everything that tended to the execution of the will. Not only was it his right to get in the debts, it was his duty; if through his negligence a debtor was allowed to go unsued until he became insolvent the executor was personally liable for the sum so lost¹. Many of the *Coutumes* expressly gave the executor the right to sue the debtors. That of Orléans art. 290 runs—

“Les exécuteurs du testament...peuvent dedans l'an de la mort du testateur intenter complainete et autres actions pour raison de la dite exécution.”

(b) Many of the *Coutumes* expressly gave the executor power to pay the testator's creditors. Orléans art. 291—

“Les dits exécuteurs testamentaires, qui ont pris la charge, peuvent dedans l'an et jour du trespas du testateur estre convenuz; et doivent comme exécuteurs, répondre des debtes et choses mentionnées au dit testament.”

The *Coutumes* of Berry (t. 18 art. 22), Melun (254), Sens (77), Auxerre (234), Troyes (115) also gave such express power. And when the testator expressly charged the executor to pay his debts, the executor's power to do so was unquestioned. But if neither the *Coutumes* nor the testator expressly authorised the payment of the debts it was a disputed point whether or not the executor could pay them. The better opinion seems to have been that he could do so in all cases.

Beaumanoir clearly contemplated the payment of the debts by the executor and gives us several curious rules about the matter². If the executor did not know to whom the testator was indebted he must have public proclamation made in all the churches of the town where the testator died that all creditors should appear on a given day at such and such a place; when they came there their demands were to be put into writing and if the executor doubted their honesty he could call upon them

¹ Furgole 158; Pothier vii 346; Le Fort p. 48.

² xii 31, 32, 33.

to prove the disputed debt as plaintiffs in an action at law. If a creditor brought an action against the executors after the latter had given up possession of the residue the defendants could plead "Noz n'avons nul des biens de l'exécution," and obtain judgment; they must not however give up the residue *pendente lite*, but must wait till judgment was delivered even if that stretched their possession beyond the legal term of a year and a day. Coquille also was in favour of the executor's power to pay the debts¹. Ricard however disliked the practice and attributed it to the influence of ecclesiastics.

"Quant au paiement des dettes c'est une ancienne erreur de croire qu'elles soient directement de l'exécution testamentaire, si le deffunt ne l'a pas ainsi particulièrement ordonné, et qui procède du temps auquel les Ecclésiastiques avoient entrepris la connoissance des testamens: car croyant qu'il alloit du repos de l'âme du testateur, que ses dettes fussent exactement payées, ils ne manquoient jamais de faire mettre dans les testamens dont ils avoient toute la direction en ce temps-là que les exécuteurs payeroient toutes les dettes et torfaits du deffunt, ...de sorte que si maintenant les exécuteurs payent les dettes, ce n'est pas en cette qualité, et comme faisant les fonctions de leurs charges; mais cela arrive en conséquence de ce qu'estant en possession des biens meubles de la succession, les créanciers saisissent entre leurs mains pour ce qui leur est dû; si bien qu'estans privilégiés et préférables à l'exécution testamentaire, il faut nécessairement que les exécuteurs les acquittent, auparavant que de pouvoir exécuter le testament²."

But Ricard does not deny that, as a matter of practice, the executor can pay the debts with the heir's consent, or without it if the testator specially authorises him to pay them, and gives a list of the debts in his will.

Furgole³ held that the executor was not entitled to pay the debts except when the property was so encumbered that unless the debts were first paid off it was impossible to execute the

¹ Coquille p. 395 "Peut l'exécuteur dedans l'an payer les dettes du defunct bien cogneus après avoir sommé les héritiers." See also Terrien, Com-

mentaires du droict civil, p. 215 for the Norman law.

² Ricard i 397—8.

³ p. 159.

will, because, he says, the executor has no powers except those expressly given him by the *Coutumes* or the testator. The great authority of Pothier was on the other side. He considered¹ that the executor could always safely pay "*dettes mobilières*" i.e. debts not secured on land or houses, if he could get the heir's consent, or failing that an order from the judge to protect him against any possible contention by the heir when the executor gave in his accounts that a debt had been wrongly paid.

The creditors did not, of course, lose their rights of action against the heir, who was the personal representative of his ancestor and could always be sued on the latter's debts. But it would generally be more convenient for the creditor to apply to the executor during his year of administration².

(c) The payment of legacies of money and movable property generally was the duty of the executor. Legacies of land and houses were delivered by the executor only if the local custom gave him possession of the immovable property. Otherwise the legatee must apply to the heir for such legacies; and to the heir also application must be made for all legacies after the executor's year of possession had expired.

As a rule the executor was bound to summon the heirs when he paid the legacies, even of movable property.

"Et aussi peuvent et doivent (les exécuteurs) faire bail et delivrance des legs aux légataires, les héritiers du testateur presens ou deurement appelez, inventaire préallablement fait des biens de ladite succession, et ce fait, les dits légataires en son et demeurent saisis³."

The *Coutumes de Clermont* however allowed the executor to distribute legacies of movables without the presence of the heir, though not legacies of immovables⁴. If the subject of a specific legacy perished by the negligence of the executor before delivery to the legatee Beaumanoir⁵ tells us that the executor was not bound to make good the loss unless he had

¹ VII 344, 347, 348.

² Le Fort p. 48.

³ Coutumes d'Orléans art. 291.

⁴ Coutumes de Clermont VII 11; Le Fort 47.

⁵ XII 52.

himself profited by his negligence; if he was simply keeping the article in good faith till the debts were paid he was not responsible.

It would frequently happen that the ready money left by the testator was insufficient to pay the debts and general legacies, and the executor was then entitled to sell as much of the movable property as was necessary to make up the deficiency. For this purpose he must obtain the consent of the heir, or failing that a decree from the court, unless the heir was willing to provide the money required¹.

If even the sale of the movables did not produce sufficient the executor, after calling on the heir to provide the necessary sum, could proceed "*par autorité de justice*" to sell the immovable property².

The *Coutume de Bretagne* (615) allowed the executor only to take the revenues of lands, not to sell them except to avoid a greater loss (*plus grand péril*). Ricard³ objected to the practice of selling the immovable property unless the *Coutumes* expressly provided for it, but did not deny its generality⁴.

Throughout the *pays de coutumes* it was the rule that the executor's possession came to an end in a year and a day⁵. The term was reckoned, according to Pothier⁶, from the time when the executor had first or might have taken possession of the property. Dumoulin refers to the term as "*annus utilis a tempore testamenti aperti, et cessantis impedimenti*?" When the year had elapsed the executor must hand over the residue if any to the heirs, unless there was a lawsuit pending against him on account of his executorship; in that case he must retain possession till judgment was delivered.

If a legacy was left dependent on the fulfilment of a condition and the condition was not fulfilled at the expiry of

¹ Ricard i 401; Furgole p. 158; Pothier vii 345.

² Troyes 100; Nivernais ch. 33 art. 4; The Bourbonnais 295; Chalons 75; Meaux 38; Chaumont 91. See Coquille, p. 394; Furgole 160—1.

³ i 396.

⁴ Pothier vii 346.

⁵ Le Fort p. 45.

⁶ vii 349.

⁷ Quoted by Pothier loc. cit.

the executor's year, the heir must see to the payment of it if it ever becomes due; the executor must on no account retain possession on the pretext of paying the legacy¹.

Even before the end of the year and a day the executor could be compelled to give up the residue if all the business connected with the execution of the will was at an end².

Finally the executor must render account of his stewardship—and this, says Beaumanoir³, for two reasons, first, that the heirs may know whether their ancestor's will has been faithfully carried out, and secondly that they may ascertain whether there is any residue. Under no circumstances could the executor be excused from giving an account, not even by an express dispensation from the testator⁴. Such a dispensation exempted the executor only from liability for the results of his negligence⁵. There was considerable variety among the *Coutumes* as to the tribunal before which the executor must make his account. Some attributed a concurrent jurisdiction to the royal and ecclesiastical judges⁶. Others excluded the ecclesiastical judge, and attributed it to the royal officers⁷ or the testator's seigneur⁸. In Brittany the Church had the exclusive cognizance of executor's accounts. This part of the testamentary jurisdiction of the ecclesiastical courts survived longer than any other. Coquille, writing at the end of the sixteenth century, speaks of it as the last relic of an "ancient error⁹." This seems a convenient place in which to say a few words on the history of the ecclesiastical jurisdiction in testamentary matters in France.

The Church claimed in the early Middle Ages jurisdiction for her courts in all questions concerning wills and their execution, and the civil power allowed the Church courts for some centuries a concurrent though never an exclusive jurisdiction over the wills of laymen, except so far as particular

¹ Beaumanoir xii 33; Pothier vii 350. contrary opinion, i 400.

² Beaumanoir xii 33; Ricard i 396; Le Fort 48.

³ xii 30.

⁴ Furgole p. 167; Ricard was of the

⁵ Cf. D. 30. 119.

⁶ Troyes 116; Meaux 39.

⁷ Valois 176.

⁸ Clermont en Beauvoisis 139.

⁹ Coquille, op. cit. p. 397.

customs allowed it (e.g. Brittany 614)¹. The ecclesiastical jurisdiction was not denied at the time of the great dispute at Vincennes in 1329, though its abuses were then complained of. But in the following century the secular lawyers became bolder in their attacks. The Parlement de Paris and the Châtelet denied *in toto* the competence of the ecclesiastical courts in testamentary matters, and claimed the exclusive cognizance of such cases for the civil courts². These principles were ultimately embodied in many of the *Coutumes*³. Finally Francis I dealt the Church courts a heavy blow by his great "Ordonnance sur le fait de la justice" of August 1539⁴. The first and second articles prohibited all, ecclesiastic or lay, from citing laymen before the Church Courts in "actions pures personnelles." The fourth article was a saving clause, but it reserved the ecclesiastical jurisdiction over laymen only in purely spiritual and ecclesiastical matters.

As we have seen, the ecclesiastical jurisdiction over executors' accounts survived the Ordonnance of 1539 in some localities—it was swept away by another famous Ordonnance, that of April 1667, "touchant la reformation de la justice⁵." Title 29 articles 1 and 2 required that the executor should give his accounts before the judge who had commissioned him if any; otherwise before the judge of his domicile. Under no pretext whatever were such matters to be sent elsewhere⁶.

The executor was bound to produce receipts for all but small payments; for these his oath was sufficient if they appeared probable, and there was no suspicion of fraud⁷. His

¹ Esmein p. 656; Glasson v 253; Beaumanoir chap. xi 10 ff., and xii 60. Beaumanoir xi 11 gives the preference to the Church courts—the lay courts are to aid the Courts Christian to constrain a recalcitrant executor. "Ne porquant, le justice laic ne fet pas ceste contrainte au commandement de le justice de sainte Eglise, mais à sa supplication."

² Esmein loc. cit.; Glasson loc. cit.

³ e.g. Lorris 248 "la congnoissance de l'exécution de testament appartient aux juges laiz." This *Coutumier* was drawn up in 1494; see Tardif's edition in his "Textes etc."

⁴ Recueil Général des Anciennes Lois Françaises xii 600 ff.

⁵ Recueil Général xviii 158 ff.

⁶ Furgole p. 168.

⁷ Orléans 299, the Bourbonnais 296; Ricard i 401; Furgole p. 169 ff.

reasonable expenses were allowed him¹. When he had given in his accounts and handed over the residue to the heir the executor was released from all further responsibility.

The law of executors was very little affected by the great reforming Ordonnances of Louis XIV and Louis XV. One small change brought about in 1667 has been noticed above. The great "Ordonnance concernant les testaments" of August 1735 expressly disclaimed any intention of altering this part of the law².

The foregoing sketch of the French law concerning testamentary executors as it was before the Code Napoléon will enable us to appreciate and to measure the changes introduced by that enactment. The object of the Code as a whole was to render the law uniform throughout France, to abolish the ancient division between the *pays de droit écrit* and the *pays de coutumes*. We have seen that in the matter of the execution of wills the two divisions of the country followed two totally different systems. The assimilation of the two systems which resulted from the labours of the compilers of the new Code was the outcome of a rough compromise. It was an unequal compromise, for the *pays de droit écrit* gave up more than the *pays de coutumes*; but the change was rendered less abrupt by the permissive character of several of the provisions effecting it.

Before we examine those articles of the Code which deal specially with testamentary executors it will be well to see what important changes had been wrought in the general law of testamentary succession.

Art. 967. "Toute personne pourra disposer par testament, soit sous le titre d'institution d'héritier, soit sous le titre de legs, soit sous toute autre dénomination propre à manifester sa volonté."

¹ Beaumanoir xii 29.

² Recueil Général xxi 386. Article 79: "N'entendons comprendre dans la présente ordonnance ce qui concerne la qualité ou la quotité des biens dont le testateur peut disposer, ni pareillement ce qui regarde l'ouverture, l'enregistrement et la publication des tes-

taments ou autres actes de dernière volonté, nomination et fonction des exécuteurs testamentaires, sur tous lesquels points il ne sera rien innové, en vertu de notre présente Ordonnance, aux dispositions des lois ou usages qui sont observées à cet égard."

"Voilà," says Maleville¹, who was one of the commissioners, "par un seul article, des milliers de lois et de volumes mis à bas, et rendus pleinement inutiles; et, en vérité, on ne doit pas les regretter." It was, indeed, a complete revolution for the old *pays de droit écrit*. The article swept away all the old Roman rules on the necessity of instituting an heir and of instituting those persons who had a right to legitim, and all the rules relating to the *quarta Falcidia* with many others. On the other hand it abrogated those rules in various of the *Coutumes* which annulled wills containing the institution of an heir or declared such an institution to be of no effect. The institution of an heir was no longer necessary in any part of the country, but if it was made it was to take effect as a universal legacy².

Art. 1004. "Lorsqu'au décès du testateur il y a des héritiers auxquels une quotité de ses biens est réservée par la loi, ces héritiers sont saisis de plein droit, par sa mort, de tous les biens de la succession; et le légataire universel est tenu de leur demander la délivrance des biens compris dans le testament."

This article was a triumph for the principle of the *droit coutumier*, "le mort saisit le vif," over that of the *droit écrit*, and was adopted only after long discussion³. It was urged that the Roman system which gave the testamentary heir (now the universal legatee) directly possession of the inheritance was simpler and more convenient than the alternative plan of giving the possession first to the heirs *ab intestato* and then passing it on to the beneficiaries. On the other side it was argued that testamentary disposition was the exception, intestate succession the rule, and that in order to protect the legal interests of the heirs *ab intestato*, or of those at least who had an indefeasible title to legitim, they ought first to be given possession of the inheritance while the validity of the will was inquired into. It was pointed out that if the universal legatee got possession of the property immediately after the testator's death he might be tempted to part with some of it in order to

¹ Analyse raisonnée II 381.

² Code Civil Art. 1002.

³ Maleville II. 406—7.

diminish the amount he would afterwards have to pay away as legitim, and in spite of practical inconveniences this contention carried the day. When there were no heirs with a right to legitim the argument did not apply and accordingly article 1006 provided that in such cases the universal legatee should be seised in full right (*de plein droit*) by the death of the testator, without being required to demand delivery from any one.

Art. 1009. "Le légataire universel, qui sera en concours avec un héritier auquel la loi réserve une quotité des biens sera tenu des dettes et charges de la succession du testateur personnellement pour sa part et portion, et hypothécairement pour le tout; et il sera tenu d'acquitter tous les legs, sauf le cas de réduction, ainsi qu'il est expliqué aux articles 926 et 927,"

which articles refer to the proportional reduction of legacies when their sum amounts to more than that portion of his property of which the testator can dispose by will. Similar provision is made by articles 1010, 1011, 1012 and 1013 for legatees "*à titre universel*," legatees, that is to say, to whom the testator leaves an aliquot share of the property of which he can dispose by will, such as one-half or one-third. There is however this difference between a universal legatee and a legatee "*à titre universel*." When there are no heirs with a right to legitim the property descends immediately to a universal legatee on the testator's death, but if the legatee is only *à titre universel* the property passes first to the heirs *ab intestato* if there are any, and from them he must demand the delivery of his share.

The ordinary course of law, then, is for the property to vest first in the heirs with a right to legitim, failing them in the universal legatee, and failing such a legatee in the other heirs *ab intestato*.

This explanation of the most general rules of succession laid down by the civil Code will enable us to understand the position held by the executor. The rules already mentioned, it must be remembered, relate to all kinds of property alike, with no distinction between movables and immovables.

The articles of the Code relating to testamentary executors are ten only in number, namely articles 1025 to 1034. They decide a few only of the most important and most general questions in this branch of the law; some of them indeed have raised more questions than they answer. We shall find that some of the most important points are still open to controversy.

The most convenient plan will be to take one by one, though not necessarily in the order in which they occur in the Code, those articles which deal with the most salient points, describing the changes introduced by them and discussing shortly the questions to which they have given rise, or which arise out of kindred topics.

Art. 1025. "Le testateur pourra nommer un ou plusieurs exécuteurs testamentaires."

Art. 1028. "Celui qui ne peut s'obliger, ne peut être exécuteur testamentaire."

Modern French authorities follow their predecessors of the *ancien régime* in treating executorship as a case of mandate¹.

"On doit donc appliquer à l'exécuteur testamentaire les règles du mandat, autant que la chose peut le comporter. Nous ajoutons cette restriction parceque la loi a fait des exécuteurs testamentaires des mandataires irréguliers sur beaucoup de points, et a introduit plusieurs dispositions qui ne peuvent convenir aux mandataires ordinaires²."

Hence we must apply the rules of mandate unless there is a special provision of the law to the contrary, and where neither source supplies a rule we must fall back on general principles.

The executor must be appointed in the testament or a codicil, since the appointment is a testamentary disposition within the sense of article 967³.

Article 1028 diverges from the rule in the case of mandate⁴;

¹ Zachariæ, Droit civil français III 257; Demolombe, Cours de Code Napoléon xxii 6; Troplong, Des donations entre-vifs et des testaments III 497; Aubry et Rau, Droit civil fran-

çais VII 447.

² Troplong III 498.

³ Le Fort p. 57.

⁴ See art. 1990.

its object is to prevent the testator from appointing an irresponsible person to manage affairs in which third parties, namely the heirs and legatees, are directly concerned. In the ordinary case of mandate only the giver of the mandate would suffer from the effects of such irresponsibility¹. Hence minors cannot be executors; married women require the consent of their husbands before taking up the office.

Art. 1026. "Il pourra leur donner la saisine du tout, ou seulement d'une partie de son mobilier, mais elle ne pourra durer au delà de l'an et jour, à compter de son décès—s'il ne la leur a pas donnée ils ne pourront l'exiger."

We have seen that under the *droit coutumier* it was the universal rule that the executor should have, as a matter of strict right, the possession of some part of the inheritance. It was a far-reaching change when the Code Napoléon by article 1026 no longer allowed the executor to claim the possession as of right but left it entirely to the discretion of the testator to give or withhold it. "Cette réforme des principes de l'ancien droit était en effet plus conforme aux idées modernes" says Le Fort (p. 82). If so, modern ideas have reproduced the ideas of the early Middle Ages².

The *Coutumes* varied with regard to the extent they gave to the executor's possession³—the Civil Code limits it strictly to the movable property. Of this the testator may give the executor possession of a part or of the whole. Some authorities indeed maintain that when there are "héritiers à réserve" the testator cannot give his executor possession of more than the amount of the movable property that is required to execute the will⁴. But the better opinion seems to be that of Demolombe⁵, who holds that there is no such restriction. The executor's possession cannot under any circumstances be extended to the immovable property—such an extension was held to be unnecessary, since the legatees have a statutory hypothec over

¹ Demolombe xxii 19; Troplong iii 508.

⁴ Zachariæ iii 261 n. 20; Aubry et Rau vii 453 n. 28.

² See above p. 89.

⁵ xxii 44.

³ See above p. 89.

them and their rights are therefore not liable to be defeated by fraudulent alienations on the part of the heir¹.

The executor's *saisine* is the right to enter into possession of the movables or that part of them assigned to him by the testator. "La saisine, c'est le pouvoir, pour l'exécuteur testamentaire, de se mettre en possession des meubles de la succession, sans jugement, sans demande²." The executor's possession is still³ held to be a mere right of *detention*, not of *possession* in the full legal sense. The heir remains not only the owner but also the possessor of the property⁴.

It is a consequence of the executor's possession that he can administer the property entrusted to his charge. He can get in the debts, give receipts and if necessary sue the debtors of the estate⁵. In such actions however he must associate the heirs with himself, since a judgment against him only would be no bar to a subsequent action by the heirs or legatees.

It is not a part of the executor's duty as such to pay the testator's debts, since that does not concern the execution of the will and is not a duty specially imposed by the law. But as a consequence of his possession of the movables the executor ought to pay the debts in association with the heir⁶, but *only* in association with the heir. Demolombe holds the opinion that the testator cannot validly give the executor a special power to pay the debts, except in so far as the payment of the debts is absolutely necessary to the execution of the will. In any case, however, the executor can, with or without such special authorisation from the testator, and with or without the heir's consent, pay such debts as he has himself contracted on behalf of the estate in the course of his administration and also certain small and urgent debts such as servants' wages⁷.

The executor's possession comes to an end in every case in a year and a day from the death of the testator. This period

¹ Demolombe xxii 37, 38.

² Demolombe xxii 47.

³ See above p. 91.

⁴ Troplong iii 501; Demolombe xxii 37, 47.

⁵ Troplong iii 504; Demolombe xxii 47; Aubry et Rau vii 455.

⁶ Troplong iii 505; Demolombe xxii 63, 64; Aubry et Rau vii 453.

⁷ Demolombe xxii 64.

cannot be extended at the discretion of the testator¹. Troplong² holds that it can be prolonged by an order of the court in some cases—"Rien n'empêche qu'en connaissance de cause ce délai ne puisse être prorogé par le juge, dans le cas, par exemple, où l'exécuteur testamentaire aurait été entravé dans ses opérations par des contestations ou autrement; ou bien encore, s'il était prouvé que le délai fût insuffisant pour remplir la mission portée dans le testament." Demolombe³ is of the contrary opinion and his view is supported by the absolute terms of article 1026 and by the fact that the article was drawn up in those terms in the final draft of the Code precisely in order to give effect to the view that the executor's possession ought in no case to be extended beyond the term laid down, a view which was not clearly expressed in the corresponding article of the first draft.

The executor's possession may come to an end before the expiration of the year and a day. This happens (a) if the testator has assigned to it a shorter term than the law allows⁴, or (b) the heir has taken advantage of the privilege accorded him by article 1027 which is as follows:—

"L'héritier pourra faire cesser la saisine, en offrant de remettre aux exécuteurs testamentaires une somme suffisante pour le paiement des legs mobiliers, ou en justifiant de ce paiement."

We have seen⁵ that under some of the old *Coutumes* the heir had a similar privilege, though in others it was not allowed. The Code Napoléon made it competent to the heir in all cases. But while some of the *Coutumes* allowed the heir to put an end to the executor's possession by merely offering security (caution) for the payment of the legacies, it is necessary under the Code for the heir to hand over the amount required to the executor in cash, or else to prove that he has already paid the legacies.

Art. 1031. "Les exécuteurs testamentaires feront apposer les scellés, s'il y a des héritiers mineurs, interdits, ou absents.

¹ On this point Troplong III 502 and Demolombe XXII 39 are agreed.

² III 502.

³ XXII 41.

⁴ Demolombe XXII 39.

⁵ Above p. 91.

“Ils feront faire, en présence de l'héritier présomptif, ou lui dûment appelé, l'inventaire des biens de la succession.

“Ils provoqueront la vente du mobilier, à défaut de deniers suffisants pour acquitter les legs.

“Ils veilleront à ce que le testament soit exécuté, et ils pourront, en cas de contestation sur son exécution, intervenir pour en soutenir la validité.

“Ils devront, à l'expiration de l'année du décès du testateur rendre compte de leur gestion.”

This article, which enumerates certain duties of the executor, does not state whether it is applicable only to the executor with possession or whether it applies equally to the executor without possession. Demolombe¹ takes the former view as to most of the duties here enumerated. For example, the duty of rendering accounts cannot fall on the executor without possession since he has no administration and thus nothing to account for. Moreover Pothier, from whom this article was taken, knew only the executor with possession. Consistently with this view Demolombe² holds that the inventory need only include the movable property since of that alone can the possession be given to the executor, and the object of making an inventory is to afford a basis for testing the accuracy of the executor's accounts at the end of his administration. Troplong, however³, thinks the words “biens de la succession” necessarily include all the property, movable and immovable, and that if the movables only had been intended the word *meubles* would have been used. Accordingly he holds that the object of the inventory is to ascertain not the amount of the property which passes into the executor's hands but the total of the whole estate in order to protect all parts of it against dilapidation and fraud.

There is further disagreement between these two authorities on the question whether or not the testator can excuse the executor from making an inventory, a question on which the older authors also disagreed⁴. Demolombe⁵, thinking, as we have seen, that the inventory is intended as a basis for the

¹ xxii 49.

² xxii 53.

³ iii 519.

⁴ Above p. 91.

⁵ xxii 54.

executor's accounts and that the rendering of accounts is imperative, holds that such a dispensation from making an inventory is null and void. Troplong¹ follows Ricard and Furgole in the contrary opinion. "Il faut remarquer," he says, "que cette controverse découlait d'une législation qui donnait toujours la saisine des meubles à l'exécuteur testamentaire, et qui, d'après l'interprétation des auteurs, obligeait seulement qu'il fit inventaire des biens meubles dont il avait la saisine, afin de constater l'intégrité de son administration et de poser les bases du compte qu'il avait à rendre." Now that the executor has not possession even of the movables in every case it is not imperative that he should make an inventory. Pothier² was dealing with a state of things in which the executor's possession was a creation of the law, and now that it is at the discretion of the testator his reasoning no longer applies. To Demolombe's argument that such a dispensation as that in question would be opening the door to a breach of good faith on the part of the executor Troplong replies that the executor will still be liable for the results of his fraud or negligence, since the obligation to show *exacta diligentia* will not be removed³.

It is the executor's duty to pay "legs mobiliers"⁴, that is to say he must hand over to the legatees specific legacies of movables and pay general legacies in money. But he must pay no legacy without first obtaining the consent of the heir or failing that a judgment against him ("un jugement rendu contre lui et passé en force de chose jugée"). This is not laid down in the Code but it is required by the general principles of law and equity, since the heir (or universal legatee) is in effect the person who pays the legacies and he ought to be given the opportunity of inquiring into the validity of the legatees' claims. If the executor does not take the precaution to get the heir's consent or the authority of the court he is personally liable to the heir for any legacies wrongly paid⁵.

¹ III 520, 521.

² See above p. 91.

³ Troplong also cites Cod. 5. 51. 13.

2. Aubry and Rau, VII 451 n. 18,

agree with Troplong.

⁴ See art. 1027.

⁵ Demolombe XXII 57.

If there is not sufficient ready money to pay the legacies the movables must be sold, and here again the heir's consent is necessary or else a judicial order¹.

Whether or not the executor can in case of need demand the sale of the immovable property is a moot point. Demolombe² and Troplong³ are of opinion that the words of article 1031, "ils veilleront à ce que le testament soit exécuté," are sufficient to give the executor this power. They point out that the executor's power to get an order for the sale of the immovables is independent of his possession, since even the legatees have this privilege in the last resort, and therefore not to be confined within the limits imposed on the latter. Aubry and Rau⁴ on the other hand declare that the practice of allowing executors to force the sale of the immovables has been deservedly criticised by the best authorities—they cite Ricard and Pothier⁵—and ought not to be followed now. The rights of the legatees, they argue, which so far as the movables are concerned can only be fully guaranteed by the power of sale, are sufficiently safeguarded so far as the immovables are concerned by their statutory hypothec over them. "D'ailleurs les dispositions de la loi sur les pouvoirs de l'exécuteur testamentaire doivent, par leur nature même, être interprétées restrictivement."

The executor's general duty to see to the execution of the will and to take measures to uphold its validity (art. 1031) gives him the power to engage in lawsuits necessary for the attainment of those objects, though not otherwise, and, if need be, even to bring an action against the heirs or the legatees to secure the due execution of the testator's directions⁶.

At the end of his year the executor must render account of his administration to the heirs *ab intestato* or the universal legatee as the case may be, or, where the succession is vacant, to the curator⁷. The accounts may be settled by friendly agreement ("à l'amiable"), or before the courts ("en justice"). In the latter case the question arises, which is the court of

¹ Demolombe xxii 60.

² xxii 61 ff.

³ iii 524.

⁴ vii 451 n. 21.

⁵ See above p. 93.

⁶ Demolombe xxii 65—67; Aubry et Rau vii 452.

⁷ Demolombe xxii 89.

competent jurisdiction for this purpose? Demolombe¹ is in favour of the court of the place where the succession is open, Troplong² of the court of the executor's domicile.

The executor is allowed all his expenses (article 1034) but can claim no salary for his work unless the will makes special provision for it—a direct application of the rule of mandate³. The better opinion seems to be that the testator cannot dispense the executor from giving an account, unless he makes him his residuary legatee, and a mere dispensation from giving an account is not to be interpreted as a legacy of the residue⁴. Aubry and Rau⁵ hold that the testator can validly excuse the executor from giving an account even when he does not make him residuary legatee.

Does article 1031 prescribe limits beyond which the executor's functions cannot extend or it is merely a list of the duties which fall to him in the ordinary course, when the testator gives no special directions? The view that it is an exhaustive list was adopted by the Court of Riom in 1839 on the ground that the mandate given to an executor is an exceptional derogation from the ordinary law of succession and must therefore be kept strictly within the limits expressly laid down in the law which permits it. The better opinion appears to be that the testator can if he pleases extend the executor's functions beyond the limits of article 1031 provided his intention is expressly recorded in the will⁶.

“Par sa mission légale, l'exécuteur testamentaire n'est chargé que de payer les legs et de veiller à l'accomplissement du testament. Mais rien n'empêche le testateur d'élargir ce mandat légal...de ce que cet article a signalé quelques uns des pouvoirs qui rentrent de plein droit dans le mandat de l'exécuteur testamentaire, il ne s'ensuit pas que la volonté du testateur ne puisse pas étendre, suivant les circonstances, l'autorité de celui qui a toute sa confiance⁷.”

¹ xxii 89.

⁵ vii 457 n. 26.

² iii 529.

³ Art. 1986: “Le mandat est gratuit s'il n'y a convention contraire.”

⁶ Demolombe xxii 71; Troplong iii 525; Aubry et Rau xiii 450; Zachariæ iii 261 takes the opposite view.

⁴ Zachariæ iii 258; Demolombe xxii 92; Troplong iii 529.

⁷ Troplong iii 525, 527.

Thus the testator may direct that the executor shall sell all the property movable and immovable in order to pay the debts, provided he does not thereby infringe on any right to legitim¹.

Demolombe² subjects the testator's freedom to enlarge the executor's ordinary sphere of activity to three conditions—

(a) The powers conferred on the executor must have for their aim the execution of a testamentary disposition.

(b) They must not be contrary to imperative or prohibitory texts of the law.

(c) They must not be against public order or good morals.

¹ Troplong *ibid.*

² XXII 72.

CHAPTER V.

THE EXECUTOR IN GERMANY¹.

THE main interest of the history of the testamentary executor in German law lies in the story of the conflict and reconciliation of an institution essentially Germanic in its origin with the Roman ideas prevalent after the reception of foreign law in the sixteenth century. In order to make that story clear a few words must be said of the position of the executor before the reception.

The chief feature of that position was the occupation by the executor of the place filled in Roman law by the testamentary heir. The will of a canon of Cologne in 1376 gives his executors power

“bona sua quecunque post mortem ipsius testatoris propria auctoritate apprehendendi et se libere intromittendi; de eisdem debita sua atque legata solvendi, clamores suos emendandi, paciscendi et sedandi, de exequiis juxta facultates suas ordinandi et disponendi...credita sua a quibuscunque personis suis debitoribus extorquendi, exigendi, petendi et levandi, et de receptis finem et quitationem ac pactum perpetuum de ulterius non petendo faciendi et pro eis agendi et defendendi in judicio et extra...ac omnia alia et singula faciendi, gerendi et exercendi, que circa premissa et eorum quodlibet necessaria forent et opportuna et que ipsemet testator facere posset...si vivus personaliter interesset².”

¹ The following chapter does not treat, except casually, of any but the Common law of Germany after the reception of foreign law.

² Quoted by Stobbe, *Handbuch des deutschen Privatrechts* v p. 262 n. 15.

In later wills the powers of the executor were as a rule not so fully set forth—his mere nomination was held to give him sufficient authority. Beseler, *Erbverträge* 1 288.

After the testator's death the executor took possession of his property¹; as a rule only of the movables, for immovables could not generally speaking be devised away from the heir². He got in the debts, paid the creditors and the legatees, attended to the testator's directions for the good of his soul and to the execution of the will generally³. He was in fact the formal personal representative of the testator⁴. But it was merely a formal representation—the executor in Germany never took the undisposed of residue as in England⁵. That residue always went to the heirs *ab intestato*—unless the testator left, as he frequently did, a general direction to the executor to dispose of the residue for the good of his soul⁶—and to those heirs the executor must account for it at the end of his administration⁷.

It was in the towns of Germany that testamentary executorship attained its highest development before the reception of foreign law, a consequence of the great increase of personal property among the townsmen. Among the nobility and landholding classes especially in Saxony the Vergabung von Todes wegen remained in use, and though wills with executors occurred among these classes the executor's powers were generally much restricted and carefully prescribed in the will⁸.

What contributed still more than the general increase of testamentary disposition among the burgher class to the development of the institution of executorship was the fact that in many towns, especially in Lübeck, it was combined and practically amalgamated with another ancient Germanic institution, the *Vormundschaft* or *Voigtei* (*tutela*, guardianship)⁹. It

¹ Heusler II 653.

² Stobbe, Handbuch des deutschen Privatrechts v 263.

³ Heusler *ibid.*; Beseler in Zeitschrift für deutsches Recht IX 155.

⁴ Beseler *loc. cit.* "Einer solchen Mittelsperson, weil der testamentarische Erbe fehlte, die formelle Vertretung des Testators hinsichtlich seiner Vermögensverhältnisse und namentlich mit Rücksicht auf die

Vollstreckung seiner letztwilligen Verfügungen zukam."

⁵ Beseler *loc. cit.* 153.

⁶ Cf. the similar clause frequently found in contemporary English wills, above p. 78. Stobbe *op. cit.* v 264.

⁷ Stobbe *op. cit.* v 266.

⁸ Beseler *loc. cit.* 151, 155; Stobbe *op. cit.* v 261 n. 4.

⁹ Beseler *loc. cit.* 152; Stobbe *op. cit.* 264; Heusler II 652. The *Salmann*

became the custom to appoint a single person to act both as executor of the will and as guardian of the testator's widow and children. For example

“Ipsum in sui testamenti executorem seu procuratorem ac puerorum suorum tutorem seu provisorem constituit¹.”

We get the two names coalescing—men are appointed “Vormunderen des Testamentes².” This double capacity gave the executor very wide powers. Even in the towns where the executor, as in Bremen³, was not a *Vormund* at all but merely a *Salmann*, he was the formal personal representative of the testator until the will was fully executed⁴. But when he was also *Vormund* of the family his powers of administration had naturally a much longer duration.

Before we pass to the reception of foreign law and its consequences it may be well to remark that in Germany the Church Courts had no jurisdiction over the testamentary affairs of laymen⁵.

The reception of foreign law in Germany was the result of a long-continued process which reached its completion during the sixteenth century⁶. Three foreign systems of law were received: the Roman civil law, the Canon law, and the Lombard feudal law⁷. We are here concerned mainly with the Roman law. And as to this German jurists distinguish between a theoretical and a practical reception⁸.

Theoretically the *Corpus Juris Civilis* as a whole, i.e. the Institutes, the Digest, the Code and the Novels of Justinian, was received in Germany as a common but subsidiary system of law. According to the theory the courts would enforce Roman law only on two conditions, that it was drawn straight

was closely connected with the *Vormund* in origin—“Der Salmann ist selber nur eine Art Vormund, denn die traditio an ihn ist nur die abgeschliffene Form des per wadium commendare, und dieses ist identisch mit der causae commendatio per festucam, worin ursprünglich die Ernennung zum Muntboro, Gewalthaber, Vormund enthalten war,” Heusler i 220.

¹ Loersch u. Schröder no. 239.

² Loersch u. Schröder no. 270.

³ Beseler loc. cit. 155 n.

⁴ Above p. 111.

⁵ Beseler loc. cit. 147.

⁶ H. Brunner in Holtzendorff's *Encyclopädie der Rechtswissenschaft* pt. i p. 291.

⁷ Brunner loc. cit. 292.

⁸ Brunner loc. cit. 293.

from one or other of the volumes of the *Corpus Juris*, and that it was applied only for the purpose of filling up a gap in the local law.

Practically, however, nothing of the kind occurred. What really happened was the introduction of the system of law that had been elaborated by the Italian school of civil lawyers since the great revival of the study of Roman law in the twelfth century. This system was of course based on Roman law; it was, in fact, Roman law modernised and transformed to suit new conditions. Moreover in practice Roman law even in this altered guise was not received as a whole (*in complexu*) but only particular institutions and particular rules. The rules and institutions that were received were very numerous and of great importance, but the Roman law was not received as a whole. On the other hand the practical reception went further than the theoretical in this, that such parts of the Roman law as were received were received not as a subsidiary system but as a fully valid and binding common law¹.

Among the portions of Roman law that were included in the practical reception were the rules relating to testamentary succession², including the rules which required that every testament should contain the institution of an heir and which designated the instituted heir as the person by whom the dispositions contained in the will were to be carried into effect.

We have seen³ that wills had already been in use in Germany for about three centuries and that testamentary executors had been brought into use to perform the duties which under the Roman system fell on the instituted heir. After the reception of Roman law therefore two radically different systems of testamentary execution were brought face to face.

When such a conflict of different legal institutions and rules was brought about by the reception of Roman law one of three results followed. Either the German institution or rule went

¹ Brunner loc. cit. 293 and in his *Deutsche Rechtsgeschichte* i 2.

² Behrend in *Holtzendorff's Encyclopädie* pt. i p. 608.

³ Above p. 31.

out of use, or the corresponding Roman institution or rule was not received, or an amalgamation took place between the two¹, each being modified so far as was necessary to adapt it to the other. In the case we have here to consider, that of testamentary execution, the course followed was the last of the three mentioned. The Roman rules came into operation yet testamentary executors did not go out of use. That the custom of appointing executors was not abandoned seems to be generally attributed to the effect of long usage². Other reasons assigned are the admitted defects of the Roman system as regards testamentary dispositions which impose no direct legal obligation on the heir³ and the desire to preserve family heirlooms and to provide for the daughters of the family, these objects being best attained through an executor⁴. But although the executor did not fall wholly into abeyance after the reception of Roman law we shall find that his importance was very much restricted.

The school of jurists which now obtained the predominance in Germany was devoted to the Roman law and endeavoured to bring all the legal institutions of the country into relation with that law. The Germanic origin of the executor and his position under the old law were forgotten⁵. The gap could not be filled up from the *Corpus Juris Civilis*, for, as we have seen, there was no true executor to be found in Roman law, and the germs of executorship which have been traced there, and discussed in the first chapter of this essay, were far from enough to supply a regular and consistent body of rules. Nor was much help to be derived from the Canon law. In one passage of that law the executor is treated as a mandatary⁶. But the theory which treated executorship as a case of mandate exerted no influence in Germany till the eighteenth century. Instead, a theory grew up and for two centuries or more held sway according to which the executor was to be treated on the

¹ Brunner in Holtzendorff's *Encyclopädie* pt. 1 p. 300.

² Beseler, *Zeitschrift für deutsches Recht* ix 157; Heimbach, in Weiske's *Rechtslexikon* x 1022; Sintenis, *Das practische gemeine Civilrecht* iii 499 n.

³ Sintenis *ib.*

⁴ Mühlenbruch in Glück's *Pandekten* xliii 404.

⁵ Sintenis p. 500 n.

⁶ c. 19. x. 3. 26 "*mandans insuper satisfieri creditoribus...post mandatum susceptum...*"

analogy of the *Vormund (tutor)*—a theory expressed in the maxim *executores ultimarum voluntatum tutoribus aequiparantur*.

The Italian school of civilians whose writings now acquired authority in Germany, like the German civilians after the reception of Roman law, had recognised the testamentary executor and sought to bring him into relation with the Roman rules of succession¹. The most influential of these writers in this department of law was Durantis, the famous Speculator, who wrote in the thirteenth century.

Durantis treats generally only of testaments containing dispositions *ad pias causas*, but he takes *piae causae* in a very wide sense, so as to include any benefaction in the public interest. He makes the position and powers of the executor vary with the presence or absence of an instituted heir.

When no heir is instituted the executor stands roughly speaking *in loco heredis* so far as the administration of the estate is concerned². Strictly speaking he is less than an heir, because he has no right to the Falcidian fourth, being a *nudus minister*, and yet more than an heir because he can be compelled to accept office and distribute the property. He can sue and be sued by *actiones utiles* like a *fideicommissarius* to whom an inheritance is handed over. If necessary he can sell the property committed to his charge, in order to apply the proceeds to uses sanctioned by the will³, e.g. to pay the legacies.

If there is an instituted heir the executor has no right to administer the estate unless the testator specially empowers him to do so. An appointment of an executor in the form "*facio talem executorem ad complendum omnia praedicta et singula*" gives the executor no power to administer the estate, or to bring any action against the heir. Durantis gives a form to be used when the testator wishes his executor to have the fuller powers—

"Dans et tribuens ei plenam ac omnimodam et liberam potestatem, atque generale mandatum cum libera administratione exigendi, petendi, et recipiendi ab heredibus infra

¹ Beseler, Zeitschrift für deutsches Recht ix 157.

Partic. II § 13, p. 339, Frankfort ed. of 1668.

² Durantis, Speculum Juris Lib. II

³ ib. p. 340.

scriptis, vel etiam a suis debitoribus, a quibus eorum voluerit, sufficientem et integram pecuniam, pro praedictis omnibus et singulis exequendis¹.”

Debtors to the testator are released by payment either to the executor or to the heir—the heir is not bound to exercise his rights of action against the debtors, but if he does not he must cede them to the executor².

An heir who neglects to pay the legacies must be admonished by a decree and then allowed a year's grace. During the year neither the executor nor the legatees may take proceedings against him; if at its end the legacies are still unpaid, he is to be deprived of the inheritance³.

The executor who has once accepted the office can be compelled to carry out the will by deprivation of his legacy, if the testator intended the legacy to be conditional on the fulfilment of the executor's duties; if nothing is bequeathed to him the bishop must first admonish him and then proceed to sentence of excommunication or even interdict “secundum negotii qualitatem.” The secular judge or the bishop may at their discretion inflict a fine or take a pledge for the execution of the will or sometimes even personally constrain the executor⁴.

The proper forum for actions connected with the execution of a will is the court either of the bishop or of the secular judge of the testator's domicile, or, if that is different from the executor's domicile, of the place where the executor accepted office or has administered.

Durantis discusses⁵ the question whether the executor is a mandatary and decides that he is not, because the mandate would expire with the testator's death, and since the testator and the heir are *eadem persona* the executor could not bring an action against the heir in execution of his mandate, while the heir could at any time revoke the mandate and so defeat the testator's intention.

Durantis' favourite analogue for the executor is the *fidei-*

¹ Durantis op. cit. p. 335.

² ib. p. 341.

³ ib. p. 347.

⁴ ib. p. 347.

⁵ ib. p. 351.

*commissarius*¹. But occasionally he compares him with a *tutor* or *curator*. From this comparison he derives the division of executors into *testamentarii*, *legitimi* and *dativi*, and the rules that the executor must make an inventory², that he may be removed as *suspectus*³, that he must render account of his administration⁴.

The German jurists of the seventeenth century seized upon the analogy of *tutela*, which Durantis and his successors had employed only in an occasional way, and made it the central point in their treatment of the law of executors⁵. This was largely due to the importance of Vormundschaft in building up the earlier rules of the Stadtrechten on executors⁶. Thus the essence of the old German law found its way into the later jurisprudence through the medium of a Roman analogy⁷. Anthony Faber was the first to develop thoroughly the law of executors from the standpoint of *tutela*⁸ and Beseler⁹ gives the following list of seventeenth century jurists who followed in the same path—Mynsinger, Treutler, Mevius, Carpzow, the Tübingen jurists, and later Struv, Stryk, Wernher and Lauterbach.

In the course of the eighteenth century, though the old theory was not at once overthrown, the opinion spread gradually that the testamentary executor should be treated as a mandatary. Thus Heinrich de Cocceji writing in 1722 said "*Executores testamenti non nisi nudi mandatarii sunt, quibus testator commisit, et mandavit curam et negotium exequendi testamenti,*" quoting the text of canon law cited above (c. 19. x. 3. 26)¹⁰. The mandate theory soon gained the upper hand and was adopted by the great writers of the present century on the Pandects¹¹.

¹ Above p. 115.

² Durantis op. cit. p. 342.

³ ib. p. 345.

⁴ ib. p. 342.

⁵ Beseler in Zeitschrift für deutsches Recht ix 159.

⁶ Above p. 111.

⁷ Beseler loc. cit. 160.

⁸ In his treatise "*De erroribus pragmaticorum,*" Decadis LXVI error 9. Heimbach loc. cit. 1024; Sintenis 500 n.; Beseler loc. cit. 161.

⁹ loc. cit. 161.

¹⁰ H. de Cocceji, Exercitationum Curiosarum II disputatio 47.

¹¹ "*Welche Pflichten übrigens den Executoren obliegen, muss aus der jedesmaligen Beschaffenheit des ihnen ertheilten Auftrags beurtheilt werden*"; Thibaut, System des Pandektenrechts 9th ed. Bd. II p. 344. "*Testaments-executoren, d. h. Personen, die zur Ausführung und Vollstreckung der Testamente...bestellt sind, haben,*

It was also adopted by the Prussian Code of 1794—Th. I Tit. 12 § 557.

“Hat der Erblasser Jemandem die Vollziehung seines letzten Willens aufgetragen: so ist derselbe als ein Bevollmächtigter des Erblassers, und die letztwillige Verordnung selbst als seine Vollmacht und Instruction anzusehen¹.”

The general attitude of the mandate school to the older Vormundschaft theory is that the executor can be treated as a Vormund only in two cases: (a) if the testator has expressly appointed him the Vormund of his family, and then he will not be Vormund *as* executor; (b) or if some particular law has imposed the duties of the Vormundschaft on testamentary executors generally, as was done for instance by a Vormundschaftsordnung of Hildesheim in 1780 in cases where the testator had not appointed guardians for his children but only executors of his will². But though the mandate theory quickly superseded the older view, the latter has more recently found a prominent supporter in Windscheid³. He admits that the executor differs from the Vormund in that his is not a public function and that he cannot be compelled to take it up, but he maintains that this only shows that the analogy fails for these two points, not that it is to be cast wholly aside.

The mandate theory was for some time the most generally held, but it was not without rivals. Beseler pointed out the obvious objections to the theory⁴. Mandate is a contract pure and simple and is extinguished by the death of either of the parties to it, yet the testamentary executor's so-called mandate is not only not extinguished by the testator's death, it then first comes into operation. “The dead enters into a contract

wenn die Bestellung durch das Testament oder durch Uebereinkunft der Interessenten geschehen ist (*testamentarii und conventionales*), die Stellung gewöhnlicher Mandatarien”; Puchta, Pandekten 6th ed. p. 663.

¹ Beseler loc. cit. 163; but the followers of the latest theory of a “letztwillige Vollmacht” claim this

passage in support of their views; see Sturm, in Ihering's Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts xx 113.

² Scholz, Über Testamentsvollziehern p. 40 n.

³ Lehrbuch des Pandektenrechts III 102 n. 7.

⁴ loc. cit. 166 ff.

with the living." The difficulty is not to be got over by referring to the passages in the *Corpus Juris* which deal with a few exceptional cases where a mandate survives the death of the mandator¹, for those are cases not of a mandate contained in a will but of a contract entered into by the parties during their lives. Nor can the beneficiaries under the will be treated as the mandators. The testator gives the executor instructions to act in their interest but that alone does not make them parties to the contract. Moreover, even if we disregard these difficulties arising out of the classical Roman rules, by regarding the executor as a mere mandatary we seriously endanger his independence as against the heirs of the testator, since the latter as representatives of the mandator can at any time revoke or alter the mandate given to him, while on the other hand the executor can also give up his office, which is against all principle. Again if, as generally happens, the testator simply names a person as his executor without particularly prescribing his powers, the nomination is practically null if the executor is treated simply as a mandatary².

The older theory which connected the executor with the "Vormundschaft" is almost equally untenable, as Beseler argues, for Vormundschaft is an institute of family law, not of the law of inheritance, and the office of Vormund is a public burden which cannot be refused except with a sufficient excuse, while executorship is wholly a private office and can be refused at will. However, Beseler admits a certain similarity between the executor and the guardian, especially when the former has the administration of the estate.

Beseler's own theory was that the executor is a person to whom the testator has given in part the right to represent him after his death—he is in fact the formal representative of the testator, while the heir is his representative in a material

¹ Above p. 10.

² For the difficulties of the mandate theory see also Windscheid III 102 n. 7 "Will man...die Kategorie des Auftrags (des Mandates) zur Construction des Rechtsverhältnisses des Testamentsvollstreckers verwenden, so muss

man unter Auftrag (Mandat) einen einseitig erklärten und einen von den Erben nicht zu widerrufenden Auftrag verstehen, und damit hat man den römischen Namen und nicht die römische Sache."

sense. The Roman *testamentifactio* did not include the right to divide the personal representation of the testator between the instituted heir and a third person in this way, but a change has been brought about since the reception of Roman law in Germany through the need of bringing the Germanic executor somehow into the scheme of succession. The result is a widening of *testamentifactio* so as to include the power denied by the classical Roman law¹.

Beseler's theory has not been widely accepted, though Le Fort seems to be wrong when he says² that no one has ever adopted it but its author³. Sintenis vigorously combated Beseler's views on the ground that they undermine the most important principle of testamentary law, the principle namely that the instituted heir is the universal successor and sole personal representative of his testator. "By what right," he exclaims, "can any one assert that the German principle has in truth triumphed over the Roman⁴?" Sintenis points out further that Beseler's theory, as Beseler himself admitted⁵, gives no help in settling details⁶.

Sintenis himself⁷ prefers to regard testamentary executorship as a development of those germs that are to be found in the Corpus Juris (not of course historically but dogmatically speaking) and treats it as a case of mandate. He meets Beseler's argument that the dead cannot contract with the

¹ Beseler loc. cit. 174 "Die *testamentifactio* des römischen Rechts ist ihrem Inhalte nach für den Testator erweitert worden, und die dem Executor übertragene Gewalt findet daher ihren Ursprung und ihre Rechtfertigung in der besonders modificirten Testirfreiheit des heutigen Rechts. Das ist das Princip der Lehre."

² p. 118.

³ Sturm loc. cit. 105 n. 1.

⁴ Sintenis p. 501 n. See also on this point Sturm loc. cit. 105. Indeed Beseler is himself rather doubtful on the point. loc. cit. 174 "Es ist selbst das Bedenken nicht ganz abzuweisen, ob auch nur diese moderne Auffassung

der Testirfreiheit, nach den Rücksichten der Zweckmässigkeit betrachtet, der streng-römischen vorzuziehen ist, und ob nicht Manches gegen diese Theilung der Erbgewalt zu sprechen scheint."

⁵ loc. cit. 174 "Freilich wird man mit diesem Princip nicht auskommen, um das Recht der Testamentsexecutoren vollständig zu entwickeln; ja die Schwierigkeit beginnt erst recht, wenn es sich um die Darstellung des Einzelnen, und namentlich um das Verhältniss des Executors zu den Erben handelt."

⁶ Windscheid III 103 n.

⁷ 502 n.

living by saying that the contract of mandate has developed since the Roman times so as to include such cases as that of the executor. Beseler admits the fact of an extension of the scope of mandate in particular directions but not in general¹. Each of the controversialists, in fact, relies on a classical principle of Roman law to confute his opponent, and each contends for a modern development of those principles to support his own case. Sintenis does not claim for the mandate theory any more than does Beseler for his own theory that it offers a solution of all questions of detail².

A theory which never had much influence was that which treated the executor as an *arbiter* (Schiedsrichter). Leyser is usually brought forward as the chief exponent of this theory, but it does not seem certain that he adopted it fully. All that Leyser said was that the testator may if he pleases give his executor the powers of an *arbiter*.

“At enim vero testator, qui executorem plerumque constituit, etsi iudicem proprie dictum non faciat, controversiarum tamen, quae inter heredes et legatarios suos oriantur, cognitionem et decisionem *si velit executori dare potest*. Et tunc executor hic non iudex, sed arbiter erit, cujus recipiendi necessitatem heredibus et legatariis a testatore imponi posse (supra) ostendi³.”

Even those who dispute the ‘arbiter’ theory admit as much as this⁴. The theory is found, however, without qualification

¹ loc. cit. 168 “Zu läugnen ist es nicht, dass auch das Mandat im modernen Rechtsleben einige Abänderungen erfahren hat, welche den strengen Regeln des römischen Rechts nicht mehr entsprechen; und namentlich mit Beziehung auf die Wirksamkeit desselben nach dem Tode des Mandanten ist es in einem Reichsgesetz ausdrücklich vorgeschrieben worden, dass die Processvollmacht des Procurators auch auf die Erben des Principals zu stellen ist. Aber dies ist eine vereinzelt Bestimmung, welche das Wesen des ganzen Rechts-

verhältnisses nicht verändert hat; dasselbe ist rücksichtlich der Aufhebung durch den Tod im Allgemeinen noch nach den Grundsätzen des römischen Rechts zu beurtheilen.”

² p. 503 n. “Der Grund davon liegt darin dass das Institut ursprünglich principlos, oder doch nach einem falschen Princip wie ein willkürliches Product einer falschen Praxis aufschloss.”

³ Leyser, *Meditationes ad Pandectas*, Specimen 374, Medit. viii.

⁴ Mühlenthal loc. cit. 419; Scholz p. 56; Sintenis p. 505.

in Hellfeld¹, and Thibaut² and Rosshirt³ attach importance to it. It rests entirely on a passage in the Canon law which is not valid in modern Germany⁴.

By more recent authors a theory has been started ("die Theorie der letztwilligen Vollmacht") according to which "executorship is an independent kind of testamentary disposition by means of which the testator bestows on a person power to carry out his will⁵." Thus Bluntschli⁶ after considering and rejecting the Vormundschaft and Mandate theories says "Das Institut ist demnach ein wesentlich erbrechtliches. Es beruht auf dem letzten Willen des Erblassers und wirkt nur nach dessen Tode ...Die juristische Stellung und die Befugniß des Executors hat ihren Grund und ihre Begränzung in der Vollmacht die ihm vom Erblasser gegeben worden." Again Dernburg⁷ like Bluntschli discards the mandate theory and declares "Die Testamentsexecution ist eine selbständige Art der letztwilligen Anordnungen des Erblassers, mittels deren er eine Vollmacht zur Ausführung seines letzten Willens ertheilt." But the advocates of this theory are by no means agreed on the important question, whom does the executor represent? Förster and Hinschius hold that he represents the heir; Dernburg prefers to make him a representative of the inheritance⁸ and places him in a quasi-contractual relation with the heirs. There is indeed general agreement on but few points of detail⁹.

Having enumerated the different points of view from which the subject has been approached by various schools of German jurists we now propose to give a general sketch of the law of executors as it is laid down by the most influential and most generally supported of these schools, that, namely, which proceeds on the theory that the relation of the testator with the

¹ *Jurisprudentia Forensis* § 1503 "Privatus vero executor arbitri loco est."

² II 343—4.

³ *Zeitschrift für Civil und Criminalrecht* I 230.

⁴ c. 13. x. 3. 26 "Qui extremam voluntatem in alterius dispositionem committit non videtur decedere in-

testatus." For the true application of this passage see above, p. 29.

⁵ Sturm loc. cit. 106.

⁶ *Deutsches Privatrecht* p. 732.

⁷ *Lehrbuch des Preussischen Privatrechts* III 451 ff.

⁸ op. cit. p. 451; so also Sturm loc. cit. p. 121.

⁹ Le Fort 118.

executor is to be regarded as a case of mandate. The chief divergences in the views of other schools will be noticed and finally the changes introduced by the new Civil Code will be examined. This plan has the advantage that the common law practice (*die gemeinrechtliche Praxis*) has generally followed the mandate theory¹, and that the adherents of the most recent of the theories mentioned above do not as a rule differ on the main questions from the followers of the mandate theory.

A testamentary executor may be appointed either in the will or by agreement between the testator and the executor. Formerly only the appointment in the will was recognised². The recognition of the appointment of an executor by agreement in the eighteenth century is to be connected with the contemporaneous recognition of the validity of the institution of an heir by agreement (*Erbeinsetzungsvertrag*) and with the mandate theory then coming into fashion³. The modern school reverts to the ancient order of things and permits an executor to be appointed only in the will or a codicil⁴, and this view is followed by the Civil Code⁵.

No one can be appointed executor who has not full legal capacity to carry out the duties entrusted to him, that is to say no one who is incapable of legally binding himself or of acting as the representative of another⁶. Thus a woman of full age can be an executor, but not so a minor.

The executor needs no authorisation from or confirmation of his appointment by any public authority.

The older authors writing under the influence of the *Vormundschaft* theory held that the general administration of the estate was a part of the executor's duties in the ordinary

¹ Stobbe *op. cit.* v 272; Sturm *loc. cit.* 107.

² e.g. by the Frankfort law. Frankf. Reformation Th. vi Tit. 11 § 1 "Es pflegen die Testirer, wann sie etwan Fürsorg tragen, wie treuwlich und fleissig ihre Testament durch ihre Erben vollzogen werden möchten, etliche vertrauwte Personen zu Testamentarien, Executoren und Aussrich-

tern desselben ihres Testaments *darinn* namhaftig zu benennen und zu verordnen."

³ Beseler *loc. cit.* 181; Mühlenbruch p. 406; Scholz p. 42.

⁴ Dernburg III p. 452; Sturm p. 114.

⁵ Article 2197.

⁶ Mühlenbruch *loc. cit.* p. 415; Beseler *loc. cit.* p. 185 and Sturm *loc. cit.* p. 116 agree.

case, i.e. when he is simply named in the will and no specific directions are given for his guidance¹. But according to most of the followers of the mandate theory the executor's duties are in that case confined strictly to the "execution" of the will in the literal sense—with the general administration of the estate he has nothing to do as a rule, for "*finis mandati diligenter custodiendi sunt*"². Mühlenbruch summarises the executor's duties thus³:

(a) He must see to the formal opening of the will when this is necessary, and inform the interested parties of its contents.

(b) He must next summon the heirs instituted in the will to declare whether they intend to enter or not, and if they do enter he must install them in possession of the inheritance. The heirs may bring an *actio utilis ex testamento* to compel the executor to put them in possession⁴.

Until the heir is installed the executor must care for the preservation of the property from loss or destruction—for this purpose he can take possession of the property but his "possession" is nothing more than detention⁵.

In case of dispute as to the division of the inheritance between coheirs the matter must be referred to the judge; the executor has no authority to settle such disputes, or disputes that arise about legacies, unless the testator had given him an express power to do so. But even the testator cannot give the executor power to act as *arbiter* generally, but only in specific cases⁶. If the testator attempts to give the executor such a general power the only effect is that in doubtful cases the executor's opinion would be preferred to the heir's⁷. Some

¹ Beseler loc. cit. 187.

² Mühlenbruch 423; Scholz 39; Gengler, Lehrbuch des deutschen Privatrechts p. 1473; Dernburg III p. 454 agrees; so also Tewes, System des Erbrechts II 24.

³ p. 417 ff.

⁴ Mühlenbruch p. 445.

⁵ He is a "factischer Detentor"; Mühlenbruch 418.

⁶ Cf. Codex 3. 13. 3 "*Privatorum consensus judicem non facit eum, qui*

nulli praeest iudicio." Scholz p. 55 says "*Die Sache bleibt immer innerhalb der Grenzen des Mandats, und so lange sie diese Bedeutung hat, muss es immer Mittel und Wege geben den Erben oder die Masse gegen Irrthümer oder fehlerhafte Handlungen des Mandatars zu schützen.*" Tewes II 24; Dernburg III 454; Beseler loc. cit. 172; Stobbe, Handbuch v 273 all agree.

⁷ This is provided for generally by the Prussian Landrecht Thl. I Tit. 12

of the older writers had held that even without such an express authorisation the executor had the power to decide all disputes, e.g. Lauterbach¹ said "*declarationes ab ipsis factae perinde habentur, ac si a testatore cujus sunt organum, provenerint.*" And the idea was the basis of the "*Schiedsrichter*" theory already alluded to.

(c) The executor must pay the legacies or see that they are paid. If he is still in possession of the property he must hand over the objects bequeathed or, in the case of general legacies, pay the money. But if the legacy is disputed the executor cannot pay it without the heir's consent. If he has handed over the property to the heir and the latter refuses to pay the legacies the executor can bring the *actio ex testamento* against him to compel him to deliver up the property necessary to enable the executor to carry out his instructions². The executor whether in possession or not can always be sued by the legatees by an *actio utilis ex testamento* and he cannot liberate himself by a cession of his rights of action against the heir³.

To the general rule that the executor has no right to administer the estate the mandate school allows a few exceptions. For instance while he is in possession before the heirs have entered he must take any steps that may be necessary to preserve the estate from loss, and so far may take up the administration. Thus he may sell property liable to perish with keeping, grant or renew leases, sue debtors whose insolvency is feared, and so forth. Sometimes, even, he may sell part of the estate, if money is required to pay the legacies, but then he must get the heir's consent or failing that a decree from the court, especially if he proposes to sell immovable property⁴. As a rule he must not pay the debts⁵. But if the creditor's claim is undeniable and he presses for payment, while delay would cause loss to the estate, the executor may

§ 561 "Wenn über den Sinn einer Verordnung des Erblassers zwischen dem Testamentsvollzieher und dem Erben gestritten wird, so gebührt in zweifelhaften Fällen der Meinung der Ersten den Vorzug."

¹ In his dissertation "*De executo-*

ribus ultimarum voluntatum" cap. 9 n. 82.

² But see Sintenis' views to the contrary, below p. 128.

³ Mühlenbruch p. 444—5.

⁴ Scholz 51 and 62—3.

⁵ Mühlenbruch 425.

pay the debt, and if the heir calls his action in question when claiming the inheritance he can protect himself by an *exceptio doli*¹. On the other hand the executor will be personally liable to make good any sums he may pay to creditors whose claims are open to question. All this however is merely by way of exception from the general rule laid down by the mandate school that the executor is not the active and passive representative of the testator and therefore cannot sue the debtors or be sued by the creditors².

So far of the rights and duties of the executor who is appointed without any special mandate or the *executor merus*. If the testator specially and expressly lays on him the task of administering the estate (in which case he is called *executor mixtus*³) his rights and obligations are the same as attach to any other administrator of another person's property. If any doubts arise they are to be settled by reference to the rules governing the *procurator omnium bonorum*⁴. The executor must make an inventory, collect the debts, pay the creditors, distribute the legacies and finally account to the testamentary heirs for his administration⁵. He is not however entitled even when he has the administration to sell the property under ordinary circumstances⁶.

Sintenis, a firm adherent of the mandate theory⁷, differs in his treatment of the subject from Mühlenbruch and Scholz, from whose works the foregoing account of the views of the mandate school is in the main condensed, in two ways. He lays great stress on the importance of preserving intact the instituted heir's personal representation of the testator, and will not allow the latter even by a special direction in his will to allot to the

¹ Mühlenbruch 426.

² See Stobbe, Handbuch v 272.

³ Mühlenbruch 426.

⁴ *ibid.* Gengler 1474.

⁵ Scholz p. 59; Gengler 1474—5; Dernburg III 456; Tewes II 25.

⁶ Scholz 62 "Weil ihm eigentlich keine Verwaltung erbschaftlicher Gegenstände zukommt, und, selbst wenn ihm diese gegeben würde, daraus jene

noch nicht folgt."

⁷ See p. 498 "Diese Testamentsexecutoren sind ihrer rechtlichen Eigenschaft nach Mandatarien des Erblassers zu dem angegebenen Zweck; ihr Verhältniss zu den Erben und zu dritten Personen, wie der Umfang ihrer Befugnisse ist im Ganzen nach den Grundsätzen vom Mandat zu bemessen."

executor functions which would infringe this principle. In doubtful cases the presumption is always against the executor¹. On the other hand Sintenis differs somewhat from Mühlenbruch in the form, though not perhaps, as he points out², in substance, in which he states the law as to the executor's right of administration. A general appointment as executor, he says, gives the right and imposes the duty of getting together and taking possession of the property, of administering it so far as is necessary and of paying the creditors and legatees so long as he does not attempt to appear as the representative of the testator in a lawsuit brought by either creditors or legatees³. Sintenis considers that the executor has the true legal possession of the property, not merely detention; but this possession is held on behalf of the heir⁴. If special directions are laid down for the executor in the will these directions must be followed but only so far as they do not trench upon the heir's prerogative as sole representative of the deceased⁵.

As to the general legal relations between the executor and the heir and other interested parties, Scholz holds⁶ that the heir has always the *actio mandati* to compel the executor to do his duty, and the executor the *actio mandati contraria* for his expenses, while the heir has also a *utilis actio ex testamento*. Mühlenbruch allows only the *actio mandati* and *contraria* when the executor has received a mandate in the strict sense⁷. If he is appointed generally he is in the position of one *honoratus et oneratus in testamento* (even though he is not a legatee) and can bring an *actio ex testamento* against the heir to compel him to deliver up the property necessary for him to carry out his instructions; on the other hand all the parties interested under the will, i.e. the heirs and legatees, can bring an *actio utilis ex*

¹ Sintenis p. 499 "Doch darf dabei (i.e. by testator's mandate) nicht wider die Grundregel des Erbrechts verstossen werden, dass der Erblasser in Vermögensverhältnissen Dritten gegenüber einzig durch den Erben repräsentirt werde, und es können also die demselben als solchen obliegenden Rechte und Pflichten weder geschmä-

lert, noch andere Personen ihnen darin untergeschoben oder an die Seite gesetzt werden."

² p. 504 n.

³ p. 504.

⁴ *ibid.*

⁵ p. 505.

⁶ p. 68.

⁷ p. 442.

testamento against the executor to compel him to carry out his obligations¹.

Sintenis will not allow that the executor can under any circumstances bring an action against the heirs except to recover his expenses². For this purpose he can bring the ordinary action of a mandatary while the interested parties have the *actio mandati directa* against him to compel the fulfilment of his duties, and, in case he has the administration, to demand an account³. No other action lies for or against the executor.

Although Beseler's theory of the executor as the formal representative of the testator met with no very enthusiastic reception it seems worth while to give a short account of his views on account of his general importance in the German juristic literature of this century and also because he made a special study of the subject.

Starting from no such definite principle as that of Vormundschaft or Mandate he arrives at no hard and fast conclusion⁴. He lays down the general principle that the executor's scope of action is to be determined as far as possible from the terms of the will, including not only the terms of his appointment, which will generally give no information, but also and especially the dispositions relating to the heir. He admits that such a method will very frequently lead to no certain result, and he can only appeal to practical lawyers to induce their clients to express themselves clearly on the matter. To the same class he appeals for support in his opinion that the executor should always be given the benefit of the doubt⁵.

¹ p. 443.

² p. 506 n. 17.

³ p. 506.

⁴ loc. cit. pp. 188—192.

⁵ "Der Umfang der Gewalt, welche dem Testamentsexecutor gebührt, hängt also zunächst von dem Willen des Testators ab, und dieser ist nach den allgemeinen Grundsätzen über die Interpretation letztwilliger Geschäfte festzustellen" p. 191. "Auch werden die Praktiker mir bezeugen, dass es

gerade die Absicht ist, diese administrativen Geschäfte in kundige Hände zu bringen, was in Deutschland den Erblasser regelmässig zur Bestellung von eigenen Testamentsvollstreckern bewegt... Nimmt man nun noch hinzu, dass für ganz einfache und geordnete Verhältnisse die Bestellung von Testamentsexecutoren überhaupt kaum angemessen erscheint, wenn nicht persönliche Beziehungen zu berücksichtigen sind, die dann aber wieder

The executor, in Beseler's view, has the legal possession of the inheritance and his possession excludes that of the heir¹. The extent of his rights of administration is to be determined by the principle that he is the formal representative of the testator², and has in that capacity the rights which would fall to the heir if no executor were appointed, modified by the necessity of observing any limitations laid down in the will or arising from the general position of the executor. For example, the heir acts in his own interest, the executor in that of others, particularly of the heir. The executor should therefore conduct his administration as far as possible in harmony with the heir's wishes. As a rule the executor cannot alienate property belonging to the estate³; this is not included in the formal representation of the testator. He can do so only when it is necessary in order to pay the creditors and legatees, or when the property is declining in value⁴. The most important result of Beseler's principle is that the executor is entitled to sue the debtors and liable to be sued by the creditors of the testator⁵.

Sturm⁶ goes even further than Beseler. He rejects entirely the distinction between *executor merus* and *executor mixtus*. "The executor has in every case, if the fulfilment of his instructions requires it, the right to get together, to administer and to distribute the inheritance⁷." Any other view Sturm holds to be

ein besonderes Moment für die Beurtheilung bilden; so möchte doch wohl die Ansicht gerechtfertigt erscheinen, dass man in zweifelhaften Fällen eher annehmen darf, der Testator habe der Person, die sein Vertrauen zur Vollziehung seines letzten Willens berufen, die weiteste Machtvollkommenheit eingeräumt, um in seinem Sinn mit Erfolg zu wirken, als dass man ängstlich darüber wacht, die Stellung, welche das römische Recht dem Erben einräumt, auch nach dieser Seite hin möglichst frei zubewahren" p. 190.

¹ loc. cit. p. 212.

² ib. p. 209.

³ ib. p. 216.

⁴ It will be seen that here Beseler practically agrees with Mühlenbruch, above p. 125.

⁵ loc. cit. p. 218. "Überhaupt ist er für die im Interesse der Erbschaft zu führenden Prozesse activ und passiv legitimirt."

⁶ In Ihering's Jahrbücher xx 120 ff.

⁷ loc. cit. p. 123 "Diese Befugniss liegt stets schon in der Formel: 'Zum Testamentsvollzieher ernenne ich den N. N.' ausgesprochen, wenn das Testament sich nicht ohne jene Geschäftskategorien vollziehen lässt."

a direct contradiction of the testator's will. If any doubt arises whether the executor requires any particular power in order to carry out the will the question must be resolved in his favour, not the heir's. The executor can take possession of the estate and his possession will be not the mere right of detention allowed by Mühlenbruch but full 'possession' in the juristic sense¹. Thus the executor has all the *remedia retinendae vel recuperandae possessionis*. He can sue the debtors even without a special authorisation from the testator², and he is bound to pay the creditors, but the latter are not therefore deprived of their right to sue the heir³. As to the legatees Sturm is of opinion that they ought to be allowed to sue only the executor, because if they are allowed to sue the heir they might get a judgment against him, perhaps with his collusion, without the executor's knowledge, yet the latter would have to answer for the payment of the legacy at the end of his administration⁴. The heir has a right of intervening in suits brought by legatees against the executor, and a right of regress against the executor if he pays legacies which for any reason ought not to be paid⁵. If it is necessary for the execution of the will the executor can even sell the assets⁶. Finally he must divide the residue among the instituted heirs. He is accountable to all the parties interested under the will⁷ and is responsible for every degree of negligence⁸.

From what has here been said it will be gathered that writers on the common law of Germany may be divided roughly into two classes so far as the law of testamentary executors hitherto has been concerned. One group, desiring to adhere as closely as possible to Roman principles, has been inclined to restrict the executor to the literal "execution" of the will (*executor merus*) and has denied his general authority to administer the estate of the deceased like a personal representative. The other

¹ loc. cit. 127 "Der Besitz muss ein vollständiger sein, denn ist der Testamentsvollzieher einmal befugt, zur Erledigung seiner Geschäfte Besitz zu verlangen, so muss er auch damit gegen die Erben durchdringen können."

² loc. cit. 141.

³ loc. cit. 140.

⁴ loc. cit. 142.

⁵ loc. cit. 143.

⁶ loc. cit. 129.

⁷ loc. cit. 130.

⁸ loc. cit. 131.

group, while not attempting altogether to oust the instituted heir from the position assigned him by Roman law, has yet, struck by the great practical convenience of the institution of executors and perhaps in some cases with recollections present in their minds of its Germanic origin, endeavoured to enlarge the executor's circle of rights and obligations to something comparable with the extent acknowledged by the English law. Beseler foretold more than fifty years ago¹ that when the time arrived for the codification of the common law the wider view of the executor's functions would be adopted. That his prophecy has been exactly fulfilled will be seen from the following articles of the new Civil Code which was promulgated in 1896 and came into force on the 1st January 1900.

§ 2203. The testamentary executor must carry out the testamentary dispositions of the testator.

§ 2204. When there are more heirs than one the testamentary executor must divide the estate between them according to the rules laid down in §§ 2042 to 2056.

The executor must consult the heirs on the scheme of partition before proceeding to carry it out.

§ 2205. The administration of the estate falls to the testamentary executor. In particular he is entitled to take possession of the estate and to dispose of the property comprised in it. He is entitled to make a voluntary disposition of such property only when required by a moral duty or by custom to do so.

§ 2206. The testamentary executor is entitled to enter into binding engagements on behalf of the estate so far as is necessary for a regular administration. The executor can enter into a binding contract to dispose of property belonging to the estate when he is competent to make such a disposition. The heir is bound to assent to such engagements, without prejudice to his right to limit his liability for the debts of the estate².

¹ In *Zeitschrift für deutsches Recht* ix 224.

² i.e. obligations incurred by the executor under this section do not bind the heir's own property by reason

of his having given his assent to them. Bendix, *Das deutsche Privatrecht auf Grund des deutschen bürgerlichen Gesetzbuches*, p. 859.

It is now therefore the rule that the executor has the right and the duty to administer his testator's estate. How far a "regular administration" extends we need not here stop to inquire.

§ 2208. The testamentary executor has not the rights accorded to him by §§ 2203 to 2206 if it appears that the testator wished otherwise.

But in such a case the executor can at least, unless the testator has expressed a wish to the contrary, demand that the heir shall carry out the provisions of the will¹.

On the other hand by

§ 2207. The testator may direct that the testamentary executor's power to enter into binding engagements on behalf of the estate shall be unlimited. But even in this event the executor is entitled to make gifts (of property belonging to the estate) only in the case provided for by § 2205.

The executor is protected from interference by the heir in the administration of the estate by

§ 2211. The heir cannot dispose of any property subjected to the executor's administration ;

and by

§ 2212. Legal proceedings in the administration of the estate can be taken only by the executor.

Even provisions of the will can be overridden under certain conditions if they tend to prevent the regular and beneficial administration of the estate². But while care is thus taken that the executor shall have all the powers necessary for a due administration the Code does not go beyond the necessities of the case, and accordingly by

§ 2217. The testamentary executor must on demand deliver up to the free disposition of the heir such part of the property comprised in the estate as is not necessary for the fulfilment of his duties. His right to administer the property is extinguished when he so delivers it up.

¹ Bendix p. 857.

² § 2216.

Thus under the new rules the executor will always have, unless the testator otherwise directs, the administration of at least so much of the property as is necessary for the execution of the will, and in the usual case of the whole estate. The views of the mandate school are now authoritatively discarded, for that school held that the executor should have the administration of the estate only when it was expressly imposed upon him by the testator¹. The new Code marks a definite return to the old German principles in vogue before the reception of Roman law, and it brings the German law into much closer relationship with the English than before. As compared with the Code Napoléon it is a movement in the opposite direction to the changes introduced by that enactment, the effect of which was rather to diminish than to increase the importance of the testamentary executor.

¹ Above p. 124.

CONCLUSION.

THE main object of this essay has been to bring the history of the testamentary executor into relation with the main features of the legal history of England, France and Germany. It is significant of the contrasts presented by the course of legal development in these different countries that the chapter on the executor in England stops short at the close of the sixteenth century while those concerned with France and Germany must be carried down to the present time.

It is only when we compare the history of English law with the history of such a legal system as that of Germany that we can fully realise the immense debt we owe to the royal power in this country. It is because the Crown from the time of Henry II onwards, speaking through its judiciary, was strong enough to make its will obeyed through the length and breadth of the land that we in England have for so many centuries enjoyed the advantages of a "common law" and have never tasted of the evils which afflicted France and Germany in the shape of an infinite variety of petty local customs. It is because the King's Courts were strong enough and wise enough to enforce uniform rules throughout the country that in England we have never troubled to discuss, like the German jurists, whether an executor is a *tutor* or an *arbiter* or a *mandatarius*. It was found convenient that the executor should have certain rights and certain duties, and the gradual extension of those rights and duties under the pressure of necessity brought him gradually into the position of the testator's personal representative. The fact that an independent set of courts, namely those of the Church, cooperated or

rather competed with the royal courts in the work of developing the institution of executorship illustrates the sway of the common law, instead of casting doubt on it, as might at first sight appear. It is because the royal courts were supreme that they could safely allow the jurisdiction in testamentary matters to slip into ecclesiastical hands. They were strong enough, in time of need, to control the church courts and therefore needed not to destroy them. In France on the other hand the dread of ecclesiastical encroachments led, as we have seen, to repeated and successful attempts of the royal power to get rid of the ecclesiastical jurisdiction in testamentary matters, limited as that jurisdiction in France had always been.

Germany, for lack of a common law of her own, adopted that of Rome and thus brought upon herself, in the department of law with which we have here had to do, a conflict between the claims of the Roman heir and the Germanic executor such as we English, in our provincialism, have never endured. The confusion of doctrine to which that conflict gave rise has been settled only within the last few years by the Code which gives Germany for the first time a definite and certain body of common civil law. The solution has been found in a return to old German doctrines, such a return as many of her best minds have wished for.

France, unlike Germany, produced even before the end of the Middle Ages a strong central power founded on the supremacy of the Crown. But, and here France differed from England, this central power arose too late to prevent the formation under the centrifugal forces of feudalism of a multitude of local laws. In the south, indeed, a more homogeneous system prevailed and Roman law held sway. France was fortunate in that the geographical separation of the two parts of the country prevented the conflict which the history of the executor has exemplified for us in Germany. She was further fortunate in that the two systems were brought into contact only at the moment when the drawing up of a Civil Code for the whole country prevented the possibility of serious conflict. In Germany the two corresponding events were separated by an interval of more than three centuries, with what result we

know. That in her customary laws, comparatively remote as they were from the disturbing influence of Roman law, France did not bring the executor into such importance as he reached in English law we must attribute partly to the feudal dislike of disturbing the continuous succession of property within the family by the interposition of a stranger between the ancestor and the heir, partly to the fact that in France the church courts, which might have set up the executor in opposition to the heir, had a narrower and less enduring jurisdiction in testamentary matters than in England. It is in the clear way in which the history of the executor brings out the salient points in the legal history of each country that the great interest of the subject lies.